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Comprehensive Land Use Planning: Learning How and Where to Grow

John R. Nolon*

*"Would you tell me, please, which way I ought to go from here?" asked Alice. "That depends a good deal on where you want to get to," said the cat.*¹

I. Introduction

A. *An Aging Citadel Under Siege*

Land use in this country is determined by zoning ordinances adopted by local governments. Their provisions dictate the types of uses to which land may be put, the density at which development may happen, the height, size and shape of buildings, and the mix of commercial, residential, public and other land uses in each locality. Zoning is a key method by which society encourages the development of jobs and housing, protects natural resources and the environment, and defines the character of its communities.

The law of most states stipulates that zoning is valid only if it is in accordance with a comprehensive land use plan.² Planning "is the essence of zoning" says the judiciary in New York State.³ Comprehensive planning is society's insurance that the public welfare is served by land use regulation.⁴

As the predicate for zoning, comprehensive planning is a critical public function. What constitutes comprehensive plan-

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1. LEWIS CARROL, *ALICE'S ADVENTURES IN WONDERLAND* 64 (Penguin Books 1960) (1865).

2. 1 EDWARD H. ZIEGLER, JR., *RATHKOPF'S THE LAW OF ZONING AND PLANNING*, § 12.02 (1992); see *infra* note 112.

3. See, e.g., *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 893 (1968).

4. See, e.g., *id.*, 235 N.E.2d at 900-01, 288 N.Y.S.2d at 893-94.

ning and how planning is done are determined by state legislatures.⁵ Given the importance of land use and the central legal role of comprehensive planning, one would expect state statutes to carefully define a comprehensive land use plan and to provide a predictable, reliable and effective method of land use planning. Surprisingly, this is not the case in the majority of states, including New York.⁶

New York's statutes are typical of those of nearly half of the states in this country.⁷ They do not define properly what a land use plan is. There is no requirement that the plans be kept up-to-date. They do not require that municipalities adopt such plans before they enact zoning ordinances. Where a land use plan and a zoning ordinance are adopted by a community, the statutes do not specify how they are to be interrelated.

The benefit of this legal dissonance is flexibility. Since plans can be whatever localities want them to be, zoning is equally malleable, since its purpose is to accomplish the objectives of the comprehensive plan. In this, danger lurks. Recent New York cases, analyzed in this article, make it clear that land use regulations will not be sustained if they are ad hoc, arbitrary, capricious, unjust, unfair or irrational - characteristics they risk assuming if not demonstrably in conformance with a discrete and well considered plan.

The biggest danger in this enigmatic system is its lack of a regional perspective. Although the courts urge that local zoning ordinances consider regional needs,⁸ there is no such requirement in the statutes. Regional development patterns are shaped by the uncoordinated land use decisions of local governments. Our legal system vests these insular⁹ institutions with primary authority to determine when and where development will occur. The landscape affected by these uncoordinated decisions is closely interrelated by the movement of air and water and of the traffic of people as they commute to and from home, work, shopping and recreation. Yet in most states, including New York,

5. 1 ZIEGLER, *supra* note 2, §§ 1.02[1]-[2], at 1-25 to 1-29.

6. 1 *id.* § 12.04.

7. 1 *id.* § 12.04 n.3.

8. See *infra* notes 57-62, 330 and text accompanying.

9. See *infra* note 61 and text accompanying.

there is no mechanism for interrelating the land use plans and zoning ordinances of adjacent municipalities.¹⁰ Increasingly, state and federal statutes attempt to protect threatened estuaries, aquifers, air quality, wetlands, and transportation systems by dealing with the effects of the land use patterns without harmonizing the direction or substance of local land use plans themselves.

In New York, the legal underpinnings of the current land use system were set nearly eighty years ago.¹¹ They were designed in a different era to meet different challenges. In those days, "comprehensive planning" referred to "city-wide" planning because developing communities were separated by open spaces and land development impacts were local in character. At that time, conformance with a comprehensive plan was defined very loosely. Localities were not required to adopt discrete land use plans. It was enough that zoning ordinances contained some evidence of comprehensive planning.¹²

In today's more complex and interrelated regions, "comprehensive" planning, in effect, means "regional" planning. Decisions made in one municipality affect regional air quality, the water quality of others in a watershed, and the cost and availability of housing and commercial real estate in the market area. Without laws that require the adoption of discrete land use plans, that tie zoning ordinances directly to the accomplishment of the provisions of those plans, and that require some relationship among local plans in the larger region, we are doomed, like Alice, to have no way of knowing where we are going and, worse, no method of getting there should we somehow decide how and where we want to use and conserve the land. How we got so lost on our road to comprehensive land use planning and how to find the road to a mutually satisfactory destination are the keenest questions facing land use regulators today.

B. *Purpose of Article*

This article explores the origins, evolution and contemporary workings of the legal system that determines the use of

10. See *infra* note 68 and text accompanying.

11. 1 ZIEGLER, *supra* note 2, § 12.07, at 12-45 to 12-50.

12. See *infra* notes 32-33 and text accompanying.

land. In Part II, the development of zoning and comprehensive planning laws in the United States is traced, emphasizing the importance that zoning be "in conformance with" a comprehensive land use plan, a requirement meant to provide direction and purpose to land use regulation. This retrospect shows that, from the beginning, the framers of the nation's land use regime were indecisive. They failed to define a comprehensive plan, to detail what such a plan should contain, and to prescribe how planning should serve as the predicate for zoning. Decisions of New York's highest court that criticize the state legislature's failure to redress the enigmatic nature of the eighty year-old system are discussed, so that contemporary challenges may be addressed.

Part III analyzes several New York cases that invalidate zoning regulations because of their failure to conform to a comprehensive plan. A checklist of the charges that property owners can bring successfully against land use regulations emerges from this discussion and highlights the special vulnerability of regulations that do not meet the historic "in conformance with" requirement.

Part IV explores the notion that regulations can constitute "takings" in violation of the Fifth Amendment's guarantees and then describes how conformance with comprehensive planning insulates regulations from Fifth Amendment challenges, as well as from the historic checklist of charges discussed in Part III. The failure of the statutory law to make comprehensive planning mandatory, and to tie regulations closely to it, is rectified, to a degree, by the weight of the case law explored in this part. The decisional law creates a practical necessity that local governments adopt comprehensive land use plans, a partial accommodation of the statutory law's failure to do so. The argument is advanced that this judicial imperative to plan before restricting land use applies to all land use regulations, not just zoning.

Part V discusses two emerging land use issues. The first involves the judicial requirement that local zoning, labeled "insular" by New York's highest court,¹³ must consider regional needs. The second is how the rapidly increasing number of federal and state laws that affect land use are to be coordinated with local land use regulations and conformed to the compre-

13. See *infra* note 61 and text accompanying.

hensive plans that local regulations are to advance. How, for example, in the absence of any formal division of the state into planning regions, and without benefit of plans for those regions, can local plans consider regional needs? Without cogent regional plans, how can the plethora of local, state, and federal land use regulations be harmonized? By concluding with an analysis of the many constituent groups whose interests are compromised by the lack of a regional solution to the land use dilemma, the article ends with the unimaginative suggestion that New York can and should address these issues and, in that process, decide "where it wants to get to" regarding the use and preservation of its land.

II. Background — The Enigma of Planning as the Legal Basis for Zoning

A. *History of Local Control of Land Development*

A vigorous debate¹⁴ over the wisdom of conforming market forces to a public plan for orderly development took place during the early part of this century.¹⁵ It culminated decisively in 1926 in favor of comprehensive¹⁶ control of development in the United States Supreme Court decision, *Village of Euclid v. Am-*

14. Zoning was "seen either as a protection of the suburban American home against the encroachment of urban blight and danger, or as the unrestrained caprice of village councils claiming unlimited control over private property in derogation of the Constitution." Arthur V. N. Brooks, *The Office File Box - Emanations from the Battlefield*, in ZONING AND THE AMERICAN DREAM 3, 7 (Charles M. Haar & Jerold S. Kayden eds., 1989).

15. The acceptance of comprehensive zoning spread quickly as landowners began to realize that reasonable restrictions, public control of the landowner's and neighboring property for the public good, would tend to stabilize and preserve the value of all property. 1 HAROLD M. LEWIS, *PLANNING THE MODERN CITY* 255 (1949). New York City's adoption of comprehensive zoning in 1916 did in fact result in stabilized property values. *Id.* at 261 (noting a statement made by Edward M. Bassett, a leader in New York's adoption of comprehensive zoning). For example, prior to the adoption of comprehensive zoning in New York City, the introduction of garment manufacturers into what had been a shopping district along the lower portion of Fifth Avenue caused property values in the district to drop by more than 50%, with a corresponding loss in tax revenues. 1 JAMES METZENBAUM, *THE LAW OF ZONING* 66-67 (2d ed. 1955).

16. Before the era of comprehensive zoning, a few cities utilized area, use, and height restrictions separately. 1 LEWIS, *supra* note 15, at 258. It was not until New York City determined that those protective restrictions and others should be collected in one general ordinance, in order to protect land values and maintain the public health and safety for the public good, that America's first comprehensive zoning regulation was adopted. 1 METZENBAUM, *supra* note 15, at 7.

bler Realty Co.¹⁷ Justice Sutherland's opinion reflected a gathering consensus among state supreme court judges that public guidance of private development was within the police power of the states.

Euclid quoted two of these state court decisions to support a pair of previously controversial notions. First, the "growing complexity of our civilization make[s] it necessary for the State . . . to limit individual activities to a greater extent."¹⁸ Second, "[the court has] nothing to do with the question of the wisdom . . . of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot — not the courts."¹⁹

The evolution of public control of land development started centuries before the beginning of the Christian era.²⁰ As an example, a Roman commission in 451-450 B.C. adopted building regulations that resemble the set-back requirements found in today's zoning ordinances.²¹ In 1581, certain noxious property uses were banned "within the compass and precinct of two and twenty miles from the City of London."²² Similar laws were passed by the early American colonies. For example, in 1692, certain business uses, deemed "offensive" by the Province of Massachusetts Bay, were limited to certain locations. Violations were punishable by fines, a portion of which was given to the informer.²³ Prior to the enactment of comprehensive zoning ordinances, some municipalities separately enacted use, area, and height restrictions on building development.²⁴

B. Codification of the Local Land Use Control System

During the first twenty-five years of the twentieth century, local officials came to realize that narrowly focused, nuisance

17. 272 U.S. 365 (1926).

18. *Id.* at 392 (quoting *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925)).

19. *Id.* at 393 (quoting *State v. City of New Orleans*, 97 So. 440, 444 (La. 1923)).

20. For examples of this evolution, including those referenced here, see ROBERT R. WRIGHT & MORTON GITELMAN, *CASES AND MATERIALS ON LAND USE* 1-14 (3d ed. 1982) and chapter 4 of 1 METZENBAUM, *supra* note 15.

21. WRIGHT & GITELMAN, *supra* note 20, at 2.

22. *Id.* at 5-6.

23. *Id.* at 9.

24. 1 LEWIS, *supra* note 15, at 258.

preventing legislation was not sufficient to address the needs of the nation's increasingly complex urban areas.²⁵ The first comprehensive zoning ordinance in the United States was passed in 1916 by New York City.²⁶ Other cities soon followed the New York example.²⁷

In 1922, the U.S. Department of Commerce published a model statute, the Standard State Zoning Enabling Act,²⁸ to promote zoning.²⁹ The model act, with certain variations, was adopted by most states as a method of encouraging and guiding their municipalities in adopting zoning ordinances.³⁰ So great was the perceived need for the regulation of land development, that by the time the *Euclid* case was decided in 1926, forty-three states had passed enabling statutes and five hundred municipalities had adopted local zoning ordinances.³¹ In this way, public control of market forces in land development was codified.

Zoning, according to one view, was intended to be an end in itself.³² However, the drafters of the enabling acts thought that

25. 1 METZENBAUM, *supra* note 15, at 14-15; see also *Euclid*, 272 U.S. at 386-87.

26. New York's comprehensive zoning efforts began in 1910 and culminated on July 25, 1916, through the adoption of the New York City Zoning Resolution. 1 LEWIS, *supra* note 15, at 259; 1 METZENBAUM, *supra* note 15, at 7.

27. 1 LEWIS, *supra* note 15, at 262.

28. STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce 1926) reprinted in 5 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING app. A. (1988).

29. Herbert Hoover, as Secretary of Commerce, appointed Frederick L. Olmsted, Edward M. Bassett and Alfred Bettman to his nine-man advisory committee to the Department of Commerce. HOUSING FOR ALL UNDER LAW 328 (Richard P. Fishman ed., 1978). This advisory committee on City Planning and Zoning promulgated the Standard State Zoning Enabling Act (SSEA) in 1922 and the Standard City Planning Enabling Act (SPEA) in 1928. *Id.* Olmsted was a prominent landscape architect with an expansive vision of the comprehensive plan and its importance. *Id.* at 327. Bassett served as chair of the New York City Committee on Building Districts and Restrictions, whose work led to the adoption of the first comprehensive zoning ordinance. 1 LEWIS, *supra* note 15, at 259-60. Bettman was a prominent Ohio attorney who wrote an amicus curiae brief on behalf of the city in *Euclid* that is cited as the "primary source" of the Court's decision in *Euclid*. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in ZONING AND THE AMERICAN DREAM, *supra* note 14, at 31, 32.

30. HOUSING FOR ALL UNDER LAW, *supra* note 29, at 331.

31. It is no wonder "[t]he zoning idea . . . spread with extraordinary rapidity, and it may safely be stated that there is no aspect of city planning which [has] now attract[ed] more attention." 1 LEWIS, *supra* note 15, at 261.

32. The "unitary" view of zoning holds that the zoning ordinance itself contains comprehensive planning principles and can exist independently from a comprehensive

more was needed.³³ A second model act, the Standard City Planning Enabling Act,³⁴ promulgated in 1928, promoted the adoption of a local comprehensive land use plan as a document separate and distinct from zoning.³⁵ This act, and its adoption by the states, gave rise in some quarters to the notion that comprehensive land use planning should precede the zoning ordinance and

plan without violating the legal requirement that zoning be "in accordance with" a comprehensive plan. HOUSING FOR ALL UNDER LAW, *supra* note 29, at 332 & n.26; *see also id.* at 342-44. The historical reason that zoning came before planning in the United States is said to be the urgent need for its adoption to protect single-family districts, the local tax-base and property values. *See* Jerry Mitchell, *In Accordance with a Comprehensive Plan: The Rise of Strict Scrutiny in Florida*, 6 J. LAND USE & ENVT'L. L. 79, 81 (1990) (citing Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) and Charles L. Simeon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987)).

In part, the urgency for promoting zoning before planning resulted from Herbert Hoover's effort to relieve housing shortages through "the adoption of zoning plans which would protect residential districts. . . . [W]ith such protection assured, real estate owners would be more likely to resume the building of houses." 1 LEWIS, *supra* note 15, at 262. These opinions are reinforced by this language from the report of New York City's advisory committee on zoning, issued on December 23, 1913, prior to the adoption of the nation's first comprehensive zoning ordinance:

It may seem paradoxical to hold that a policy of building restriction tends to a fuller utilization of land than a policy of no restriction; but such is undoubtedly the case. The reason lies in the greater safety and security to investment secured by definite restrictions. The restrictions tend to fix the character of the neighborhood.

Id. at 260 (quoting HEIGHTS OF BUILDING COMMISSION, REPORT TO THE COMMITTEE OF THE HEIGHT, SIZE AND ARRANGEMENT OF BUILDINGS OF THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK (1913)). There is evidence that early proponents of zoning were motivated as well by public health and safety matters, traffic congestion, and the like. 1 METZENBAUM, *supra* note 15, at 7-8; 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW 311 (1988). In fact, the United States Supreme Court sustained zoning based on its similarity to common law prohibitions on the nuisance use of private property. *Euclid*, 272 U.S. at 388.

33. Bettman took the position that the comprehensiveness of the zoning ordinance itself was the key consideration, although he recognized the importance of conforming to a plan: "[T]he fact that the zone plan is an organic part of the whole city plan furnishes an additional item of proof of its reasonableness." Alfred Bettman, *The Present State of Court Decisions on Zoning*, 2 CITY PLAN. 24, 26-27 (1926). "By zoning is meant the comprehensive zone plan based on a comprehensive survey; and if the zone plan be part of a more comprehensive city plan, it derives from that fact an additional element of reasonableness and therefore has additional constitutional support." *Id.* at 34.

34. STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce 1928).

35. THE PRACTICE OF LOCAL GOVERNMENT PLANNING 40 (David S. Arnold et al. eds., 1979).

serve as its predicate.³⁶ In the promulgation of the model acts and the progress of local land use regulation, zoning came first. Many states adopted the Standard City Planning Enabling Act, but after they had created the legal framework for zoning.³⁷ Most failed in any meaningful way to prescribe how zoning and planning were to be integrated. This fissure remains today, narrowed by provisions in most states that require zoning to be in accordance with the comprehensive land use plan and by reforms in others that require a plan to be adopted before land use is regulated.³⁸ Because zoning preceded planning in both the Hoover Commission and in most state legislatures, the enigma of

36. Lewis wrote that: "The danger is that [zoning] may be considered a substitute for city planning and that, a zoning plan having been adopted, enthusiasm and interest may die out. Zoning is not a substitute for a city plan; it is an essential part of a comprehensive plan." 1 LEWIS, *supra* note 15, at 261-62.

Professor Charles Haar viewed the statutory comprehensive plan . . . as a separate document for purposes of zoning 'in accordance with a comprehensive plan.' In light of the lack of specific authority in the [Standard State Zoning Enabling Act], Haar recognized that his position was in the minority. But today there is a demonstrable shift toward his point of view. . . . It is ironic that while Haar's writing was widely quoted, and relied upon in a number of land-use decisions, he was frequently cited to support the "unitary" view of the statutory requirement . . . (the zoning ordinance itself suffices as the comprehensive plan), a position he attacked in his own writing.

HOUSING FOR ALL UNDER LAW, *supra* note 29, at 331-32 (footnotes omitted) (citing Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955)).

37. HOUSING FOR ALL UNDER LAW, *supra* note 29, at 49 & n.238.

38. See *infra* note 85 for those states that have mandated local governments to adopt comprehensive plans before regulating land use. The notes accompanying the Standard State Zoning Enabling Act state that the requirement that zoning be "in accordance" with a comprehensive plan "will prevent haphazard and piecemeal zoning. No zoning should be done without such a comprehensive study." HOUSING FOR ALL UNDER LAW, *supra* note 29, at 328. Language in the Standard City Planning Enabling Act that defines the content and role of the comprehensive plan throws further light on the legal effect of the plan. The Standard City Planning Enabling Act defined the purpose of the master plan as:

Guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, order, morals, convenience, prosperity, and general welfare as well as efficiency and economy in the process of development, including, among other things, adequate provision for traffic, the provision of safety from fire and other dangers, adequate provisions for light and air, the promotion of good civic design, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.

Id. at 329 (quoting SPEA § 7).

conforming zoning to planning is as old as comprehensive land use regulation itself.

The Standard City Planning Enabling Act recommended that plans be adopted by planning boards while zoning ordinances were to be adopted by the local legislative bodies.³⁹ This separation of responsibility for the preparation of zoning ordinances and land use plans renders the local land use system more enigmatic; in practice, how can a local legislative body be bound by a plan adopted by a lay board that is advisory in function? This division of authority has a certain logic, however. A visionary, long-term plan for the community does not have short-term impacts on property values and neighborhood character, and is less likely to arouse impassioned resistance.⁴⁰ Since a planning board is comprised of appointed, rather than elected, members, the pressure of the electorate is felt less in its deliberations.⁴¹

In these ways, long-term community planning is immunized from short-term political considerations. To the extent that the zoning ordinance, although adopted by the local legislature, an elected body, is required to conform to the comprehensive land use plan, it enjoys a degree of immunization from such pressures

39. Bassett recognized the difficulty of keeping the comprehensive plan current and supported the notion that the planning board shall adopt the plan, not the municipal legislature. EDWARD M. BASSETT, *THE MASTER PLAN* 83-84 (1938). Compare N.Y. GEN. CITY LAW § 28-a (McKinney 1989 & Supp. 1993), and N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993), and N.Y. VILLAGE LAW § 7-722 (McKinney 1973 & Supp. 1993) (empowering planning boards to enact master plans) with N.Y. GEN. CITY LAW § 20(24) (McKinney 1989), and N.Y. TOWN LAW § 261 (McKinney 1987), and N.Y. VILLAGE LAW § 7-700 (McKinney 1973) (empowering town boards, village boards, and city councils, respectively, to enact zoning ordinances).

40. "It is of the essence of zoning, therefore, that it regulates development. Planning does not involve this coercive control, although zoning ordinances are the means whereby planning goals are achieved." BEVERLY J. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 4-5 (1982); see, e.g., *Headley v. City of Rochester*, 272 N.Y. 197, 5 N.E.2d 198 (1936) (master plan does not effect a taking of property).

41. The important thing is that the work of planning be entrusted to [those with] vision as well as technical training and experience. . . . [A] reasonable plan, once decided upon, should be adhered to in its essential features notwithstanding the opposition and the insistent demands for a departure from it which are likely to be encountered from those who are actuated by selfish interest or who are unable to look beyond their own limited horizon.

1 LEWIS, *supra* note 15, at 17.

as well.⁴²

C. Defining a Land Use Plan

As this land use system evolved, basic concepts were left undefined, not the least of which was the definition of a comprehensive land use plan itself.⁴³ The definitions of a comprehensive land use plan used during the formative period of this century are as numerous as are the terms used to describe such a plan.⁴⁴ The document itself is called, variously, a master plan, a

42. There is a great need for the master plan even though it is visionary in nature, for

[w]ithout one, if an emergency arises which brings a popular clamor for some particular bridge or tunnel or main thoroughfare, this clamor is likely to be translated into a favorable vote by the [legislative body]. Later the [legislative body] may discover that the new improvement which may have cost millions of dollars was not co-ordinated with other features of the plan. Every city engineer of experience realizes that there ought to be a master plan and also official maps.

BASSETT, *supra* note 39, at 69. Planning commissions are to give guidance to legislative bodies; the "master plan" serves as the guide and should be "a plastic plan kept within the confines of the commission." *Id.* at 67-68; see *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

43. A leading contemporary textbook on planning published by the American Planning Association defines a land use plan as having the following characteristics:

- * It is primarily a physical plan, although it may incorporate social and economic objectives.
- * It is long-range, slightly utopian, inspired by a vision of the future, and provides how to get there.
- * It is comprehensive, dealing with the entire community and its major development issues: transportation, housing, land use, utilities, recreation and their interrelationships.
- * The plan contains a statement of policy and is a guide to the land use actions of local legislators and other decision-makers.

THE PRACTICE OF LOCAL GOVERNMENT PLANNING, *supra* note 35.

44. 1 LEWIS, *supra* note 15, at 7-8, quotes several early experts on the definition of a land use plan. George McAneny, who was Chairman of the Board of the Regional Planning Association, defined city planning as:

getting ready for the future . . . growth. It is the guidance into proper channels of a community's impulses towards a larger and broader life. On the face it has to do with things physical — the laying out of streets and parks and rapid-transit lines. But its real significance is far deeper; a proper city plan has a powerful influence for good upon the mental and moral development of the people. It is the firm base for the building of a healthy and happy community.

Id. at 7. Earle S. Draper defined city planning as:

a great number of things. Careful surveys and inventories of resources are necessarily the first requirement. The deliberative process which we call planning consists of an analysis of the facts, of an appraisal of the situation, and of the resulting considered opinion which comes forth as a plan presented in the proper garb,

comprehensive plan, a comprehensive master plan, a land use plan, a comprehensive land use plan, an official master plan, and so on.⁴⁵ There was no clear agreement as to whether this document should limit itself to physical phenomena,⁴⁶ or should include economic, demographic, and social matters.⁴⁷ What is meant by comprehensive itself is unclear.⁴⁸ Most definitions presuppose a local focus, but some include regional and state-wide considerations.⁴⁹ The precise relationship of the comprehensive

whether it be pictures, charts, maps, verbal descriptions, or a combination of all of these.

Id. Nelson P. Lewis defined it as "simply the exercise of such foresight as will promote the orderly and sightly development of a city and its environs along rational lines with due regard for health, amenity, and convenience and for its commercial and industrial advancement." *Id.*

45. 'Planning,' as it was conceived by its great early advocates, Bassett, Bettman, and others, involved a great deal more than the preparation of one all-controlling, definitive plan which was to be the blueprint for all public and private development. On the contrary, there were to be many plans, each evolved for a special purpose, some outlining proposed public development, others outlining sub-division control, and still others showing where it was proposed to curb private building - the zoning map. Some plans thus drawn were to have the force of local law (such was the zoning map); others were merely to forecast future developments (e.g., population changes), and others were to be essentially advisory in their nature. The master plan, properly so called, was to be of the latter variety, incorporating the planner's ideas as to the ideal development of the community.

POOLEY, *supra* note 40, at 14-15.

46. [A] different type [of definition] appears in the following statement by Edward M. Bassett, an attorney eminent in planning and zoning law:

City planning subjects are streets, parks, public reservations, sites for public buildings, harbor lines, locations for transportation facilities, and zoning regulations. There may be others, but I think not. When these are stamped by law on the land, there you have a city plan.

1 LEWIS, *supra* note 15, at 7-8.

47. The evolution of planning science is influenced in part by the following: (1) demographics; (2) economics; (3) views of government responsibility; (4) planning theories; and (5) the ever emerging stressors in our developed and developing regions. HOUSING FOR ALL UNDER LAW, *supra* note 29, at 325.

48. The American public is not educated to the necessity of a comprehensive plan, but is sometimes alive to . . . one feature of such a plan, as, for instance, transportation or zoning; and the planner, unable to do what he would, must do what he can. In such cases, however, the need of a general plan should always be kept in mind, and as an incident to the smaller task, as much of the larger undertaken as is feasible. This is in fact the practice of wise city planners; for instance, all good zoning is based on preliminary surveys, which are partial planning studies.

FRANK B. WILLIAMS, THE LAW OF CITY PLANNING AND ZONING 28 (1922).

49. The expanding scope of city planning is indicated by the statement of purposes in the constitution of the American Institute of Planners [originally the

land use plan with the zoning ordinance, the zoning map, and the official map was never entirely agreed upon.⁵⁰ The elements of a plan, that is, the subjects to be covered in it, have been described in numerous ways as well.⁵¹

This review of the creation and early evolution of the land use system establishes that it was enigmatic at inception. There was little agreement as to most of its critical details.⁵² One clear

American City Planning Institute], as amended in 1946. It reads:

Its particular sphere of activity shall be the planning of the unified development of urban communities and their environs, and of states, regions, and the nation, as expressed through determination of the comprehensive arrangement of land uses and land occupancy and the regulation thereof.

1 LEWIS, *supra* note 15, at 6, 8.

50. "[Bassett] pointed out that 'a master plan cannot take the place of an official map, although it may help to co-ordinate items in that instrument.'" *Id.* at 54 (citing and quoting BASSETT, *supra* note 39, at 11-44, 69). The SPEA itself caused confusion for localities that wanted to have their official map separate from their master plan.

[T]he *master plan* is . . . called an *official plan*. It is contemplated that the official map and master plan shall not be two documents but one. Somewhat later the master plan is referred to repeatedly as the *official master plan*, the distinction being made between the master plan before it has been translated in whole or part into a precise plan through its adoption by the council and the same master plan after it has been made precise and so adopted.

BASSETT, *supra* note 39, at 85 (emphasis added).

51. Lewis divided the comprehensive plan into six principal, non-exclusive elements that included: (1) "The pattern of land uses;" (2) the mass-transportation system; (3) public facilities for the fast movement of passengers and goods; (4) "the street system;" (5) the park and recreational system; and (6) "the location of public buildings." 1 LEWIS, *supra* note 15, at 54-55. In 1928, the SPEA set forth suggested elements of comprehensive plans. HOUSING FOR ALL UNDER LAW, *supra* note 29, at 329. Edward M. Bassett listed zoning districts, streets, public building sites, public reservations, parks, public utility routes, and bulkhead and pierhead lines as elements of planning. 1 LEWIS, *supra* note 15, at 54. One architect categorized the comprehensive plan into twelve areas of study: "streets; transportation of people; transportation of goods; factories and warehouses; food supply and markets; water supply and sanitation; housing; recreation; parks; boulevards and tree planting; architecture; laws and financing." *Id.* at 53. The city plan should contain and harmonize many elements including the streets, parks, and mass transportation. Additionally, it should address "the subdivision of building land and the regulation of the height, area with relation to the size of lot, and use of structures on it." WILLIAMS, *supra* note 48, at 27.

52. Note how this lack of agreement persists. The Model Land Development Code makes planning optional, except when local governments want to enact certain sophisticated development controls. MODEL LAND DEV. CODE § 3-101 nn.1-3 (1976). The American Bar Association's Advisory Commission on Housing and Urban Growth recommended that local governments be mandated to undertake comprehensive planning. See HOUSING FOR ALL UNDER LAW, *supra* note 29, at 408-10. It was not until the 1992 legislative session that the state legislature in Connecticut passed a statute requiring that local zoning regulations "consider" the local plan of development. 1992 CONN. LEGIS. SERV.

conclusion emerges, however. The framers of the system wanted those involved in its implementation to carry on a conversation about the goals and objectives of land use regulation. This conversation was to touch on, at a minimum, the major public interest issues affected by land use. It was to be carried on at the appropriate level and in requisite detail to confront the challenges of the day. This conversation, call it comprehensive land use planning, can be civil and productive because it is removed from the rancorous debate over specific regulations and particular projects. Whether we are abiding by this vision of land use planning is the key question for lawmakers in New York to consider.⁵³

D. *Challenges to Local Land Use Control in New York State*

In New York, there has been little effort to eliminate the confusion that surrounded the birth and early development of the national system of local land use control.⁵⁴ This confusion is compounded by the complex challenges of a more interdependent society threatened by environmental deterioration and economic stagnation. Despite clear evidence of our regional interdependence and the need for a more integrated and cost-effective system, local officials still determine the shape and pace of land development, decide the economic fate of land owners and act as the stewards of our natural resources. The system of local control of land use has remained relatively unburdened by clear

160-61 (West) (Public Act 92-50, *amending* CONN. GEN. STAT. ANN. § 4-6 (West 1992)).

53. See *supra* notes 8-10.

54. In 1970, one of the first state-wide comprehensive planning bills in the country was introduced in the New York Senate. Senate Bill 9028 called for state-wide comprehensive planning, regional plans and county plans, all compatible and consistent with one another. S. 9028, 193rd Leg. Sess. §§ 3-106(2), 3-104, 4-101, 4-102(1)(c) (1970). County plans were to direct development into high density areas and away from agricultural and rural lands. *Id.* § 3-301. Local governments were to exercise their land use authority in conformance with the county plans. *Id.* § 3-106(2). These provisions would have established an integrated state-wide land use system of the type that was eventually adopted in Florida, FLA. STAT. ANN. §§ 186.001-187.201 (West 1987 & Supp. 1993) (Florida State Comprehensive Planning Act of 1972 and the State Comprehensive Plan), and Oregon, OR. REV. STAT. §§ 197.005-860 (1991) (Comprehensive Land Use Planning Coordination). The reaction against S. 9028 was so strong that the bill failed to reach the full Senate, see 1970 N.Y. LEGIS. REC. & INDEX S. 677, and the administrative agency that proposed it was disbanded by the legislature shortly thereafter, 1971 N.Y. LAWS ch. 75, § 11 (eliminating the New York Office of Planning Coordination).

planning directives since it was created by the state legislature over seven decades ago. It is, however, under siege. Its strength is being sapped by preemptive state and federal regulations;⁵⁵ it is being attacked in the courts and a sympathetic ear has been given to complaints that the system is not working.⁵⁶

Twenty-one years ago, in *Golden v. Planning Board*⁵⁷ the New York Court of Appeals called on the state legislature to adopt a system of “[s]tate-wide or regional control of [land use] planning” to “insure that interests broader than that of the municipality underlie various land use policies.”⁵⁸ The state’s highest court minced no words in 1972, when confronted by a growth control ordinance adopted by a single municipality in a growing county. It stated that New York’s zoning enabling legislation “is burdened by the largely antiquated notion which deigns that the

55. See John R. Nolon, *The Erosion of Home Rule Through the Emergence of State Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497 (1993); see also the State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1993). SEQRA requires that all public agency decisions that affect land use be subjected to a thorough review of their impact on the environment. *Id.* § 8-0109(2). The range of actions subject to such review is extensive, making the scope of SEQRA nearly coextensive with the scope of land use regulation itself. See *id.*; see also N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984) (defining environment as “the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.”). Under SEQRA, public agencies are authorized to perform Generic Environmental Impact Studies in advance of more particular decisions later on. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15 (1987). This authority is remarkably similar to the authority of local planning boards to adopt “comprehensive master plans.”

In this law, there is a built-in disincentive to carry out traditional comprehensive planning. The SEQRA statute requires environmental planning, broadly defined, of all individual land use actions, at the expense of the applicant. The regulations provide that the cost of area-wide Generic Environmental Impact Studies may be imposed on later applicants. *Id.* In this indirect way, the cost of land use planning may be transferred from the public sector to the private sector. There is no requirement that such studies conform to the local comprehensive plan. *Id.* Ironically, under existing case law, locally and regionally adopted environmental impact studies can become part of the “relevant evidence” courts look for in discovering the “comprehensive plan” with which zoning actions must conform. See, e.g., *Udell v. Haas*, 21 N.Y.2d 463, 471-72, 235 N.E.2d 897, 902, 288 N.Y.S.2d 895-96 (1968).

56. See *infra* notes 71 and 322.

57. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

58. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150; see also *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 681 (1975).

regulation of land use and development is uniquely a function of local government.”⁵⁹ Under this system of local control of land use, “questions of broader public interest have commonly been ignored.”⁶⁰ The court referred to criticisms of community autonomy and commented that local land use control suffers from “pronounced insularism” and produces “distortions in metropolitan growth patterns.”⁶¹ It noted that local control had the effect of “crippling efforts toward regional and [s]tate-wide problem solving, be it pollution, decent housing, or public transportation.”⁶²

In returning to this subject after twenty years, the court of appeals recently confronted the costs of enigmatic land use planning in a dramatic setting. In *Long Island Pine Barrens Society, Inc. v. Planning Board*,⁶³ the court reversed a lower court decision that had delayed 224 development projects, valued at over \$11 billion and containing more than 12,000 housing units.⁶⁴ The appellate division had held that the three towns in which these projects were located must review the cumulative effect of these projects on the drinking water aquifer under the State Environmental Quality Review Act (SEQRA).⁶⁵

The court of appeals disagreed, noting simply that “[h]ere, . . . there is no plan”⁶⁶ It found that a general governmental policy, contained in a host of local, state and federal laws, designed to protect the drinking water aquifer was not the same thing as a land use plan.⁶⁷ Such a plan is the predicate for requiring an analysis of the cumulative effects of otherwise unrelated projects. The court echoed its earlier sentiments, stating that “the existing system of land-use planning in the region is plainly not equal to the massive undertaking that effective long-range planning would require, and some other system devised by

59. *Golden*, 30 N.Y.2d at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 148.

60. *Id.*

61. *Id.*, 285 N.E.2d at 299, 334 N.Y.S.2d at 149.

62. *Id.* (citations omitted).

63. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

64. See Josh Barbanel, *Court Halts Projects Planned for Pine Barrens*, N.Y. TIMES, Mar. 12, 1992, at B1.

65. *Long Island Pine Barrens Soc’y, Inc. v. Planning Bd.*, 178 A.D.2d 18, 29-30, 581 N.Y.S.2d 803, 809-10 (2d Dep’t 1992).

66. *Pine Barrens*, 80 N.Y.2d at 514, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

67. *Id.* at 514-15, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

a larger planning entity must be substituted.”⁶⁸ The state’s highest court referred this matter of “urgent public concern” to the state legislature just as it did twenty years ago.⁶⁹

The essential criticism of the land-use planning system is that local officials cannot respond to the complex needs of rapidly developing regions or manage the escalating conflict between economic development and environmental preservation. Curiously, the critics have taken their frustrations to the courts instead of their state legislators, the gatekeepers of this now ancient citadel. While no meaningful reform proposals have been discussed in Albany, the courts have been besieged by complaints.⁷⁰ The numerous suits brought by environmentalists to block development have been countered by an equal number of actions by landowners alleging that land use restrictions violate due process or effect a taking of property without just compensation.⁷¹

Under the statutory scheme in New York, the primary method of controlling the pace and shape of land development is the local zoning ordinance.⁷² As can be seen readily, the land use law in New York closely parallels, and shares the enigmatic nature of, the historic system described above. The city, town and village laws all decree that such zoning regulations *shall* be in accordance with a comprehensive plan.⁷³ In other words, zoning must be consistent with local planning. This requirement makes obvious sense; how else are courts to judge whether a regulation properly advances the public welfare?⁷⁴ Paralleling the national system, however, the local planning board is not required to

68. *Id.* at 516, 606 N.E.2d at 1380, 591 N.Y.S.2d at 989.

69. *Id.* at 517-18, 606 N.E.2d at 1381, 591 N.Y.S.2d at 990.

70. *See supra* note 54, and *infra* notes 71, 86, and 87.

71. Developer suits of this type are so numerous that they have been characterized as a “movement.” *See, e.g.,* Keith Schneider, *Environmental Laws Face Stiff Test From Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1.

72. N.Y. GEN. CITY LAW § 20(24) (McKinney 1989); N.Y. TOWN LAW § 261 (McKinney 1987); N.Y. VILLAGE LAW § 7-700 (McKinney 1973).

73. N.Y. GEN. CITY LAW § 20(25) (McKinney 1989); N.Y. TOWN LAW § 263 (McKinney 1987); N.Y. VILLAGE LAW § 7-704 (McKinney 1973 & Supp. 1993).

74. “[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.” *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 893-94 (1968).

adopt a plan.⁷⁵ State law merely provides that local planning boards *may* adopt “a comprehensive master plan” for the community.⁷⁶ Thus, land use planning in New York is discretionary; this is the enigma of mandatory congruency and discretionary planning. How can zoning ordinances be required to conform to local plans when planning itself is not required? The enigma is compounded in the state statutes’ delegation of planning and zoning authority to different local bodies. Plans are to be adopted by an appointed planning board while zoning ordinances are to be adopted by the elected legislative assembly.⁷⁷

E. *The “Land Use Plan” — An Illusory Concept*

The mystery of the land use system in New York is heightened by the lack of clear statutory guidance. The law contains no definition of what a land use plan is or what it must contain. Under current law, zoning ordinances must be in conformance with “a comprehensive plan” yet planning boards are given the authority to adopt “a comprehensive master plan.”⁷⁸ These terms are not the same and they are not clearly defined by the very statutes that place so much legal emphasis on them.

The statutes offer no definition of a “comprehensive plan” at all. Only a partial definition of the “comprehensive master plan” is provided.⁷⁹ The legislature has stipulated that a com-

75. N.Y. GEN. CITY LAW § 28-a (McKinney 1989 & Supp. 1993) (repealed effective July 1, 1994, by 1993 N.Y. Laws ch. 209); N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993) (repealed effective July 1, 1994, by 1993 N.Y. Laws ch. 209); N.Y. VILLAGE LAW § 7-722 (McKinney 1973 & Supp. 1993) (repealed effective July 1, 1994, by 1993 N.Y. Laws ch. 209). The legislature repealed these provisions in 1993, adding new language that defines a “comprehensive plan” and gives the local legislative body, rather than the planning board, the authority to adopt a comprehensive plan, in its discretion. This new law goes into effect on July 1, 1994. 1993 N.Y. Laws ch. 209 (to be codified at N.Y. GEN. CITY LAW § 28-a, N.Y. TOWN LAW § 272-a and N.Y. VILLAGE LAW § 7-722).

76. See *supra* note 39.

77. See *supra* note 39.

78. Compare N.Y. GEN. CITY LAW § 20(25) (McKinney 1989), and N.Y. TOWN LAW § 263 (McKinney 1987), and N.Y. VILLAGE LAW § 7-704 (McKinney 1973 & Supp. 1993) (using “comprehensive plan”), with N.Y. GEN. CITY LAW § 28-a (McKinney 1989 & Supp. 1993), and N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993), and N.Y. VILLAGE LAW § 7-722 (McKinney 1973 & Supp. 1993) (using “comprehensive master plan”). See *supra* note 75.

79. See, e.g., N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993). The legislature, in 1993, added a definition of the comprehensive plan in the changes made to the Town, Village and General City Laws referenced in footnote 75, *supra*. That definition is

prehensive master plan show desirable public facilities such as streets, parks, and public buildings. The content of such a plan has not been limited, but it must provide for capital facilities at a minimum. The lack of clear definitions in the origins of this system has not been corrected by legislation in New York.⁸⁰

In the absence of a legislative definition of the comprehensive plan to which zoning must conform, the judiciary has been called frequently to probe this mystery. Judicial decisions have provided the following guidelines:

- Zoning can be legal even in the absence of a written plan.⁸¹
- The statutes are satisfied if, implicit in the zoning ordinance itself, there is evidence of rational planning.⁸²
- Once a plan is adopted, it does not have to be kept current. In such cases, courts will not require "slavish servitude to any

as follows:

As used in this section, the term "[town, village, or city] comprehensive plan" means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the [town, village or city]. The [town, village or city] comprehensive plan as herein defined, shall, among other things, serve as a basis for land use regulation, infrastructure development, public and private investment, and any plans which may detail one or more topics of a [town, village or city] comprehensive plan.

See, e.g., 1993 N.Y. Laws ch. 209, § 1. The law also lists 15 topics that "may" be included in a comprehensive plan. This new law has several apparent effects. It eliminates the discretionary authority of planning boards to adopt a "comprehensive master plan," rendering the planning board's role in planning ambiguous. It gives the legislative body the discretion to adopt a "comprehensive plan," harmonizing planning terminology with zoning terminology, since zoning must be in conformance with a "comprehensive plan." See *supra* note 73. The law may broaden the effects of the comprehensive plan, noting that it "shall serve" as the basis for "land use regulation" not just zoning. However, after July 1, 1994, when these new provisions go into effect, planning will still be discretionary. What is to be included in a plan is also discretionary, and the historic role of the planning board in the process is now unclear. Contrast this to the laws of about half the states that require local government to adopt plans, define certain elements that must be included in a plan, outline the roles of local agencies with clarity and require localities to keep their plan up to date.

80. See *infra* note 86 regarding proposed legislation to define the comprehensive plan.

81. See *Daum v. Meade*, 65 Misc. 2d 572, 318 N.Y.S.2d 199 (Sup. Ct. Nassau County 1971).

82. See *Randolph v. Town of Brookhaven*, 37 N.Y.2d 544, 337 N.E.2d 763, 375 N.Y.S.2d 315 (1975).

particular comprehensive plan," but look rather for "comprehensiveness of planning."⁸³

- In the absence of any plan or the presence of an out-dated one, courts will "examin[e] all relevant evidence" of comprehensive planning found in previous land use decisions of the locality, including the zoning ordinance itself.⁸⁴ The circular and confusing nature of these judicial definitions is obvious. They stand for the general proposition that zoning must serve the public interest and that some expression of that interest, independent of the zoning enactment itself, is desirable, but not always necessary. This tepid expression of the requirement that zoning be "in accordance with" the comprehensive plan falls far short of a mandate to adopt a comprehensive plan before adopting land use regulations as several state legislatures have required.⁸⁵

F. Zoning — A Flexible and Illusive Tool

Another consequence of vague statutory language is that zoning in New York has evolved into a flexible, if unpredictable, method of land use regulation. The land use statutes in New York do not define "comprehensive plan."⁸⁶ Until very recently, they did not define a "variance," a "site plan," a "special use

83. See *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973).

84. See *Udell*, 21 N.Y.2d at 471-72, 235 N.E.2d at 902, 288 N.Y.S.2d at 895-96.

85. To some degree, the legislatures or courts of at least the following states require local governments to adopt a comprehensive plan before they are authorized to undertake specified forms of land use regulation: Arizona, ARIZ. REV. STAT. ANN. §§ 9-461 and 9-461.01 to 9-461.12 (1990 & Supp. 1992); California, CAL. GOV'T CODE § 65860 (West 1983); Delaware, DEL. CODE ANN. tit. 9, §§ 2651-61, 4951-61, 6951-61 (1989); Florida, FLA. STAT. ANN. §§ 163.3167(2), 163.3194 (West 1990); Hawaii, HAW. REV. STAT. § 46-4 (1985 & Supp. 1992); Idaho, IDAHO CODE §§ 67-6508, 67-6511 (1989 & Supp. 1992); see also *Dawson Enters., Inc. v. Blaine County*, 567 P.2d 1257, 1262 (Idaho 1977) (dictum); Kentucky, KY. REV. STAT. ANN. §§ 100.183, 100.201(2) (Michie 1982 & Supp. 1992); Maine, ME. REV. STAT. ANN. tit. 30-A, §§ 4314(1)-(3), 4321-27, 4352 (West Supp. 1992); Montana, MONT. CODE ANN. §§ 76-1-101 to 76-1-606, 76-2-101 to 76-2-412 (1993); Nebraska, NEB. REV. STAT. §§ 14-401 to 14-403, 15-1101 to 15-1106, 19-901, 23-174.01 to .09 (1991); New Jersey, N.J. STAT. ANN. § 40:55D-62(a) (West 1991 & Supp. 1992), see also *Pop Realty Corp. v. Springfield Bd. of Adjustment*, 423 A.2d 688 (N.J. Super. 1980); Oregon, OR. REV. STAT. § 215.050 (1991); see also *Baker v. City of Milwaukie*, 533 P.2d 772 (Or. 1975); Rhode Island, R.I. GEN. LAWS §§ 45-22.2-1 to 45-22.2-14 (1991 & Supp. 1992).

86. For a definition of "comprehensive plan" that will take effect in 1994, see *supra* note 79.

permit," "transfer of development rights," or "incentive zoning," to name just five of a variety of zoning techniques that have been used for decades at the local level.⁸⁷ As a direct result of this lack of definition, what constitutes zoning has been the subject of much debate. The conservative view is that zoning is a rigid, district bound technique and that the precise rules must be set down in advance of development. Land use attorneys frequently state, for example, that zoning can control the "use" but not the "user" of property.⁸⁸ These observations are logically derived from basic due process notions.

If this view is correct, how do we explain court decisions that have articulated the following rules?

- Zoning districts can be created and "float" subject to a request by a qualifying landowner for their application to his property.⁸⁹
- In proper cases, zoning can specify the attributes of people who can build, own, and live in certain types of developments.⁹⁰
- Rezoning can be conditioned on the development meeting requirements demonstrably within the public interest, but not contained in the ordinance itself.⁹¹
- Uses can be permitted by special permit, also subject to such

87. Several of these terms have been defined by amendments to the town and village laws due to the work of the New York State Legislative Commission on Rural Resources. N.Y. TOWN LAW § 267(1) (McKinney Supp. 1993) and N.Y. VILLAGE LAW § 7-712(1) (McKinney Supp. 1993) (defining "variances"); N.Y. TOWN LAW §274-a(1) (McKinney Supp. 1993) and N.Y. VILLAGE LAW § 7-725-a(1) (McKinney Supp. 1993) (defining "site plan"); N.Y. TOWN LAW §274-b(1) (McKinney Supp. 1993) and N.Y. VILLAGE LAW § 7-725-b(1) (McKinney Supp. 1993) (defining "special use permit"); N.Y. TOWN LAW §261-a(1)(d) (McKinney Supp. 1993) and N.Y. VILLAGE LAW § 7-701(1)(d) (McKinney Supp. 1993) (defining "transfer of development rights"); N.Y. TOWN LAW §261-b(1)(e) (McKinney Supp. 1993) and N.Y. VILLAGE LAW § 7-703(1)(c) (McKinney Supp. 1993) (defining "incentive zoning"); see James A. Coon and Sheldon W. Damsky, *Revisions to State Zoning Laws Enacted*, MUN. LAW., Sept.-Oct. 1991, at 1; Terry Rice, *Statutory Changes Provide for Incentive Zoning*, N.Y. L.J., Nov. 13, 1991, at 40.

88. See *Vlahos Realty Co. v. Little Boar's Head Dist.*, 146 A.2d 257, 260 (N.H. 1958) ("[Z]oning conditions and regulations are designed to regulate the land itself and its use and not the person who owns and operates the premises by whom such use is to be exercised.").

89. See *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951).

90. See *Maldini v. Ambro*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975).

91. See *Church v. Town of Islip*, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

conditions.⁹²

- Waivers of requirements can be given in the interest of achieving a planned unit development, integrating diverse land uses in an otherwise single-use district.⁹³
- Variances from zoning requirements may be granted if the "spirit" of the law is not violated by them.⁹⁴

The lack of clarity and definition in New York land law has enabled local officials to invent this impressive array of "zoning" tools. These devices have been sustained by the courts when they meet the illusive requirement of being in accordance with the comprehensive plan.⁹⁵ In sustaining Tarrytown's adoption of a "floating zone," for example, the New York Court of Appeals sanctioned inventive zoning with these words: "If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not 'spot zoning,' even though it (1) singles out and affects but one small plot . . . or (2) creates in the center of a large zone small areas or districts devoted to a different use."⁹⁶ Judge Conway, in dissent, was incredulous that Tarrytown could create a zoning technique so at odds with traditional Euclidian zoning, which emphasizes the rigid separation of land uses. He characterized Tarrytown's action as "unprecedented," "most assuredly not 'zoning,'" "unauthorized by the Village Law of this State, which is the sole source of the board's power to act," "at odds with all sound zoning theory and practice" and "the opening wedge in the destruction of effective and efficient zoning in this State."⁹⁷

In the absence of clear rules and definitions to guide local land use control, local regulators have enjoyed great flexibility to act to respond to emergent needs. This has been the singular strength of the historic land use system. The advantage of this flexibility, the diversity of local needs in New York, the strength

92. See *Penny Arcade, Inc. v. Town Bd.*, 75 A.D.2d 620, 427 N.Y.S.2d 52 (2d Dep't 1980).

93. See *Ahearn v. Zoning Bd. of App.*, 158 A.D.2d 801, 551 N.Y.S.2d 392 (3d Dep't), *motion for leave to appeal denied*, 76 N.Y.2d 706, 561 N.E.2d 888, 560 N.Y.S.2d 988 (1990).

94. See *Aucello v. Moylan*, 60 Misc. 2d 1094, 304 N.Y.S.2d 765 (Sup. Ct. Westchester County 1969).

95. See *supra* note 73 and text accompanying.

96. *Rodgers*, 302 N.Y. at 124, 96 N.E.2d at 735 (citation omitted).

97. *Id.* at 126-27, 96 N.E.2d at 736 (Conway, J., dissenting).

of the "home rule" tradition,⁹⁸ and the difficulty of altering de facto patterns of regulation are but a few reasons that explain why the state legislature has proceeded with caution in reforming this system.

G. *Local Zoning is Required to Respect Regional Needs*

It is perhaps the failure of local land use regulation to consider its inter-municipal impacts, and the lack of any technique that requires an accounting for them, that call most convincingly for reform. The courts have required that local zoning consider regional needs.⁹⁹ For two decades New York's highest court has urged the legislature to reform the land use system to facilitate such consideration.¹⁰⁰ Its decisions reflect these propositions:

- That growth naturally occurring in the private market must be accommodated by localities, subject to reasonable growth management requirements.¹⁰¹
- That meeting the needs of the people of the state generally must be an objective of local land use regulation; the welfare of the landowners and citizens within the geographical boundaries of the community is not the sole end of land use regulation.¹⁰²
- That local governments are not competent, by themselves, to measure regional needs and decide how to accommodate them.¹⁰³
- That state and regional agencies should articulate such needs and explain to local governments the extent to which they

98. For an explanation of the very limited extent to which local "home rule" power constrains the state legislature from acting in the land use area, see Nolon, *supra* note 55.

99. See, e.g., *Berenson*, 38 N.Y.2d at 110, 341 N.E.2d at 243, 378 N.Y.S.2d at 681; *Golden*, 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

100. See *supra* notes 53-65 and accompanying text; see also *Pine Barrens*, 80 N.Y.2d at 517-18, 606 N.E.2d at 1381, 591 N.Y.S.2d at 990; *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682; *Golden*, 30 N.Y.2d at 376, 285 N.E.2d at 301, 334 N.Y.S.2d at 150.

101. *Golden*, 30 N.Y.2d at 377-79, 285 N.E.2d at 301-02, 334 N.Y.S.2d at 151-53; see also, *Albrecht Realty Co. v. Town of New Castle*, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (Sup. Ct. Westchester County 1957).

102. *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681.

103. *Golden*, 30 N.Y.2d at 375-76, 285 N.E.2d at 300, 334 N.Y.S.2d at 149-50.

must meet such needs.¹⁰⁴

These judicial tenets reflect the notion that, since local zoning authority is derived from the state's police power, zoning must be exercised with the broader interests of the state in mind.¹⁰⁵ How these broader interests are to be articulated, and localities to be accountable to them, is the key question of land law reform in New York. Although the state legislature has begun the reform process by adding needed definitions and clarity to the law, this issue has yet to be addressed in any meaningful and formal way.¹⁰⁶

H. *Legislative Inaction*

What the state legislature has not done is now easier to evaluate. The list of omissions is impressive:

- Cogent planning regions of the state have not been

104. *Pine Barrens*, 80 N.Y.2d at 516, 606 N.E.2d at 1380, 591 N.Y.S.2d at 989; *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682; *Golden*, 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

105. For example, the court in *Berenson* stated:

[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements. . . . Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality.

Berenson, 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

106. For a recent statutory amendment that promotes intergovernmental cooperation among local governments regarding land use planning and regulation, see 1992 N.Y. LAWS ch. 724 (codified at N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1993), N.Y. TOWN LAW § 284 (McKinney Supp. 1993), and N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1993)). Area-wide land use plans may be adopted by county governments, but few have entered the field. N.Y. GEN. MUN. LAW § 239-d (McKinney 1986 & Supp. 1993). The legal effect of county land use plans is not clearly defined, although court decisions give them a presumption of legislative validity, if adopted by the county legislature. *Blitz v. Town of New Castle*, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983). Counties may comment on local actions which affect land proximate to county facilities and municipal boundaries, but the effect of their negative comment is only to require a majority plus one vote on the matter at the local level. N.Y. GEN. MUN. LAW § 239-m (McKinney 1986 & Supp. 1993). It is hard to tell whether this is helpful or simply a further complication, particularly in the absence of a county land use plan. For a complete discussion of the statutory history of regional and county authority in New York, see generally Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 PACE L. REV. 505 (1993). For a national review of trends in regional governance, including a discussion of regional regulatory agencies, see generally John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 PACE L. REV. 449 (1993).

delineated.

- Regional needs have not been identified.
- The extent of local responsibility for accommodating such needs has not been articulated.
- Local planning is not required or seriously encouraged even in areas of the state undergoing development pressure or where critical natural resources exist.
- What a local plan is and what it must include have not been defined.
- There is no administrative review of whether local plans are consistent with state-wide or regional objectives.¹⁰⁷

I. *The Vulnerability of Land Use Regulations to Attack*

As a result of these legal incongruities, zoning and other regulations designed to control growth or to protect the environment are vulnerable to attack.¹⁰⁸ As demonstrated above, land use planning is the historical basis of land use regulation. The two were designed, however unartfully, to go together. Planning insulated regulation from the pressures of politics. It provided a reasonable basis for limitations on the use of private land in the public interest. It follows that when regulations are adopted without reference to planning objectives or, worse, are contrary to such objectives, they are vulnerable to attack. If planning is not done, if it is not specific, or if it is not up to date, and if regulations are not buoyed by the plan, the base on which land use regulations rest is infirm. This makes a strong case for fundamental reform of the legislative system under which land use regulations operate.

In the litigious climate created by the clash in society between property rights advocates and land regulators, regulating

107. A number of states with land use systems similar to New York's have reformed the law by establishing a more coherent and integrated system. These reforms tend to eliminate the deficiencies in the New York system that are listed here. See Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 484-500 (1993); Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 347-50 (1993); *supra* note 85.

108. So much litigation has been brought contesting the validity of local land use regulation that this activity in the courts has been called a "movement." SCHNEIDER, *supra* note 71, at A1.

in a planning void is inadvisable.¹⁰⁹ This is particularly so in light of personal liability suits brought against regulators and their agencies.¹¹⁰ In the next part, this article examines how the failure to honor the "in accordance with" provision of the land law can subject regulations to a variety of attacks by aggrieved property owners.

III. Failure to Plan Subjects Land Use Regulations to Attack

A. *An Illustrative Case*

In *Udell v. Haas*,¹¹¹ a property owner contested the reclassification of his property from a business to a residential use by the Village of Lake Success on Long Island. The court began its analysis, as it should, by looking for the village's comprehensive plan. It understood that "the comprehensive plan is the essence of zoning."¹¹² The court noted two defects in land use regulation that occur when comprehensive planning is missing. The first was that "[w]ithout [a plan], there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll."¹¹³ The second was that "the 'comprehensive plan' protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials."¹¹⁴

Lake Success had not adopted a "comprehensive master

109. In the absence of a cogent plan which ties land use regulations to clearly stated public objectives, developers and landowners can not know what to develop and where; courts find it difficult to judge the reasonableness of local regulations. This lack of guidance begins to explain why land use regulation is so tedious, expensive and time consuming.

110. 42 U.S.C. § 1983 (1988) ("Every person who, under color of any statute . . . subject[s], . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .").

111. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

112. *Id.* at 469, 235 N.E.2d at 900-01, 288 N.Y.S.2d at 893. The court also references "[t]he almost universal statutory requirement that zoning conform to a 'well considered plan'. . . . (See Standard State Zoning Enabling Act, U.S. Dept. of Commerce [1926] (sic))." *Id.*, 235 N.E.2d at 900, 288 N.Y.S.2d at 893.

113. *Id.*, 235 N.E.2d at 901, 288 N.Y.S.2d at 893-94.

114. *Id.*, 235 N.E.2d at 901, 288 N.Y.S.2d at 894. "[T]here is a danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners." *Id.* (quoting Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157-58 (1955)).

plan;" therefore, there was no single document that could constitute a "comprehensive plan."¹¹⁵ As a result, the court was forced to deal with the enigmatic nature of the New York State land use system. Since planning is not required, and what constitutes a plan is not specified by law, the court had to define a judicial strategy for determining whether this rezoning conformed, as required, to a comprehensive plan.¹¹⁶

This was the moment in the historical development of New York's planning law for the highest court to determine how to interpret the "in accordance with" requirement. Did the zoning ordinance itself constitute the plan?¹¹⁷ Did zoning have to conform to a separate, independent, comprehensive planning document?¹¹⁸ Was evidence of comprehensive planning in the adoption of zoning enough to satisfy the requirement?¹¹⁹

The Court of Appeals began its analysis by "examining all relevant evidence."¹²⁰ In the absence of an adopted plan, it looked at the zoning ordinance and zoning map for evidence of comprehensive planning.¹²¹ It also reviewed a 1958 zoning amendment that was entitled a "development policy" for the village.¹²² This policy articulated a vision of the village as a low-density, single-family community with commercial development only in peripheral areas.¹²³ The plaintiff's land was in such an area and had been classified by the zoning ordinance, prior to the contested rezoning, as business property.¹²⁴

Having discovered the plan for the community in this piecemeal fashion, adopting in the process the "evidence of comprehensive planning" standard for interpreting the "in accordance

115. *Id.*, 21 N.Y.2d at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896.

116. *Id.* at 472-76, 235 N.E.2d at 902-05, 288 N.Y.S.2d at 896-99.

117. For an early New York case taking this view, see *Harris v. Village of Dobbs Ferry*, 208 A.D. 853, 204 N.Y.S. 325 (2d Dep't 1924). This case was decided before the adoption of the Standard City Planning Enabling Act. See *supra* note 29.

118. See, e.g., *Fasno v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973).

119. See *Eves v. Zoning Bd. of Adjustment*, 104 A.2d 7 (Pa. 1970).

120. *Udell*, 21 N.Y.2d at 471, 235 N.E.2d at 902, 288 N.Y.S.2d at 895. Development policies "may be garnered from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map." *Id.* at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896.

121. *Id.*

122. *Id.*

123. *Id.* at 472-73, 235 N.E.2d at 902-03, 288 N.Y.S.2d at 896.

124. *Id.* at 466-67, 235 N.E.2d at 899, 288 N.Y.S.2d at 891-92.

with" requirement,¹²⁵ it was not hard for the court to determine that the rezoning, which diminished plaintiff's property value by sixty percent, was not in conformance with comprehensive planning.¹²⁶ In constitutional terms, the land use action of the village violated substantive due process;¹²⁷ it was not designed to accomplish a valid public objective.¹²⁸ In statutory terms, the action was beyond the powers of the village since it did not conform to the plan.¹²⁹ "Hence [the] ordinance . . . must be held to be *ultra vires*¹³⁰ as not meeting the requirements of . . . the Village Law that zoning be 'in conformance with a comprehensive plan.'"¹³¹

The plaintiff also complained that the reclassification of his land was discriminatory.¹³² The court used a narrow inquiry to review this allegation. "The issue is the propriety of the treatment of the subject parcel as compared to neighboring properties."¹³³ The evidence provided by the plaintiff established that other similarly situated properties were allowed to be used for business uses, leading the court to agree that the rezoning was discriminatory.¹³⁴ Discrimination, said the court, "is a wrong

125. *Id.* at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896. This interpretation of the "in accordance with" requirement is that there must exist evidence of comprehensive planning in the adoption of zoning, which would satisfy the requirement. *See supra* note 116.

New York has never interpreted its statute (which follows the Standard Zoning Enabling Act) to require the adoption of an independent comprehensive plan, but has been willing to find the land-use policies of a community in a comprehensive plan, if one exists, as well as in the zoning ordinance and zoning map.

HOUSING FOR ALL UNDER LAW 364 (Richard P. Fishman ed., 1978) (citing *Udell*, 21 N.Y.2d at 471-72, 235 N.E.2d at 902, 288 N.Y.S.2d at 895).

126. *Udell*, 21 N.Y.2d at 476, 235 N.E.2d at 904-05, 288 N.Y.S.2d at 899.

127. *See infra* notes 150-175 and accompanying text.

128. *Udell*, 21 N.Y.2d at 475-76, 235 N.E.2d at 904-05, 288 N.Y.S.2d at 898-99.

129. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899. "Such [zoning] regulations shall be made in accordance with a comprehensive plan . . ." N.Y. VILLAGE LAW § 7-704 (McKinney 1973).

130. The Latin phrase "*ultra vires*" (beyond the power) is frequently used by the courts to characterize a local land use regulation taken outside of the local government's authority. *See, e.g., Moriarty v. Planning Bd.*, 119 A.D.2d 188, 196, 506 N.Y.S.2d 184, 189 (2d Dep't 1986), *infra* notes 201-06.

131. *Udell*, 21 N.Y.2d at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

132. *Id.*

133. *Id.*

134. *Id.* at 476-77, 235 N.E.2d at 905, 288 N.Y.S.2d at 899-900.

done to the community's land use control scheme."¹³⁵

The court also found fault with the process by which the rezoning was accomplished. It wrote, "the process by which a zoning revision is carried out is important in determining . . . [its] validity" ¹³⁶ The facts showed that the development policies of the community were clear when, on the morning of June 21, 1960, the plaintiff's representative appeared at the village offices with a plan for the business development of the property.¹³⁷ That evening, the village planning board recommended a change in zoning from business to residential use.¹³⁸ Within a month, the rezoning was accomplished.¹³⁹

The court characterized this process as a "rush to the statute books,"¹⁴⁰ and found that the rezoning was not "accomplished in a proper, careful and reasonable manner."¹⁴¹ "The amendment was not the result of a deliberate change in community policy and was enacted without sufficient forethought or planning."¹⁴² This amounted to a violation of procedural guarantees. Planning is more than the substantive result. It is also a process, aptly described by the court as careful, reasonable and deliberate.¹⁴³ The failure to plan properly in Lake Success led to a finding that the rezoning violated procedural due process guarantees.¹⁴⁴

The village's failure to conform its regulation of the plaintiff's land to its comprehensive plan led to the invalidation of the contested action on four separate grounds. It did not meet either substantive¹⁴⁵ or procedural due process tests,¹⁴⁶ it was

135. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899. See *infra* notes 187-99 and accompanying text.

136. *Udell*, 21 N.Y.2d at 474, 235 N.E.2d at 903, 288 N.Y.S.2d at 897.

137. *Id.* at 473, 235 N.E.2d at 903, 288 N.Y.S.2d at 896-97.

138. *Id.*, 235 N.E.2d at 903, 288 N.Y.S.2d at 897.

139. *Id.*

140. *Id.* at 474, 235 N.E.2d at 903, 288 N.Y.S.2d at 897.

141. *Id.* at 475, 235 N.E.2d at 904, 288 N.Y.S.2d at 899 (quoting *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 122, 96 N.E.2d 731, 733 (1951)).

142. *Id.*

143. *Id.* at 469-70, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

144. *Id.* at 474, 235 N.E.2d at 897, 288 N.Y.S.2d at 903. See *infra* notes 176-86 and text accompanying.

145. *Udell*, 21 N.Y.2d at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

146. *Id.* at 473-74, 235 N.E.2d at 903, 288 N.Y.S.2d at 896-97.

beyond the village's legal authority,¹⁴⁷ and it was discriminatory, in violation of the plaintiff's equal protection rights.¹⁴⁸

The message is clear. Over thirty years ago, the courts gave landowners a checklist to use in analyzing whether land use actions are proper.¹⁴⁹ All of them emanate from the land use plan. If a plan is developed in an orderly way, if it is reasonable, and if it can be shown that the regulation achieves one of its objectives, it is likely that a contested regulation will withstand attack on all four of these grounds. Each of these lines of attack on a land use regulation and how the failure to meet the "in accordance with" requirement can be fatal to a regulation are explored in greater depth in the material that follows.

B. *Substantive Due Process*

The *Udell* case demonstrates that a land use regulation must not be arbitrary or capricious; it must be reasonably related to the achievement of a valid public purpose to comply with substantive due process guarantees of the Fifth Amendment of the Federal Constitution.¹⁵⁰ In the seminal zoning case, *Village of Euclid v. Ambler Realty Co.*,¹⁵¹ the U.S. Supreme Court established the standard of review to be used by the courts when the wisdom of a regulatory scheme is challenged on

147. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

148. *Id.* at 477, 235 N.E.2d at 906, 288 N.Y.S.2d at 900.

149. *See supra* notes 145-48 and text accompanying. The checklist is developed by the court in its substantive review of the four charges made by the plaintiff in *Udell v. Haas*.

150. The Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. A similar limitation on government action is applied to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV. In New York, this "due process" requirement is contained in the New York Constitution, using language virtually identical to that of the U.S. Constitution. N.Y. CONST. art. I, § 6. Due process has been characterized as both substantive and procedural. Substantive due process is concerned with the essential fairness of the action of government. BLACK'S LAW DICTIONARY 1429 (6th ed. 1990). In the property regulation field, the issues are whether the regulation is designed to accomplish a valid public purpose and is reasonable and fair. Procedural due process concerns the "process" that is followed in the adoption of regulations that affect property rights. Apart from the substantive content of the regulation, it must be adopted and administered in a way that treats affected interests fairly, giving them notice and a reasonable chance to be heard before an accessible and impartial tribunal. DANIEL R. MANDELKER, LAND USE LAW 58-60 (2d ed. 1988).

151. 272 U.S. 365 (1926).

due process grounds. “[T]he reasons [must be] sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁵² Failure to conform with a comprehensive plan risks violating this standard of review.

In *McMinn v. Town of Oyster Bay*,¹⁵³ the substantive due process tests of a land use regulation were reviewed. The case is a reminder that a land use regulation must meet a two part test to satisfy substantive due process. First, the zoning ordinance “must have been enacted in furtherance of a legitimate governmental purpose.”¹⁵⁴ Second, “there must be a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.”¹⁵⁵

The Oyster Bay zoning ordinance restricted the occupancy of single-family housing to any number of persons related by blood, marriage or adoption, or to two persons not so related but who are sixty-two years of age or older.¹⁵⁶ The plaintiffs had rented their four-bedroom home to four unrelated young men. The dispositive issue was whether the zoning ordinance could restrict the use of single-family homes in this fashion.¹⁵⁷ The Court of Appeals found that there was a “legitimate governmental purpose” in preserving the “character of traditional single-

152. *Id.* at 395. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962) (“Indulging in the usual presumption of constitutionality, . . . we find no indication that the . . . Ordinance . . . is unconstitutional. . . . [T]his court has often said that ‘debatable questions as to reasonableness are not for the courts but for the legislature. . . .’” (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932))). This United States Supreme Court standard of review has been adopted in New York for zoning cases challenged on due process grounds:

[D]ecision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it.

Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951).

153. 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

154. *Id.* at 549, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130.

155. *Id.*, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130-31.

156. *Id.* at 547-48, 488 N.E.2d at 1241-42, 498 N.Y.S.2d at 130.

157. *Id.* at 547, 488 N.E.2d at 1241, 498 N.Y.S.2d at 129.

family neighborhoods, reduction of parking and traffic problems, control of population density and prevention of noise and disturbance."¹⁵⁸ However, the court found that the means of achieving this purpose was not reasonably related to that end. The provision was characterized as a violation of the plaintiff's due process rights; as restrictions based on the size of the household were reasonably related to the achievement of the town's legitimate purpose, but those based on the type of relations among the occupants of a house were not.¹⁵⁹

In *Kraizberg v. Shankey*,¹⁶⁰ the plaintiffs sought an extension of the existing town sewer district to serve their property, but were denied based upon an alleged lack of capacity at the town's central sewage plant and attendant infiltration and inflow problems. The supreme court annulled the town board's denial because the findings were not supported by the evidence.¹⁶¹ The appellate division affirmed this holding. In addition, the appellate division found that even though the town board had the power to create sewer improvement districts,¹⁶² its decision was not based upon "a determination of the public interest but upon the desire of town residents and the Board to minimize development."¹⁶³ The Board's determination was thus "arbitrary and capricious," lacking support by substantial evidence.¹⁶⁴

In *Walus v. Millington*,¹⁶⁵ the failure to show reasons for deviating from the plan constituted spot zoning and was fatal to the rezoning of an individual parcel.¹⁶⁶ The plaintiffs challenged the validity of a zoning ordinance reclassifying the defendant's parcel from single-family residential to general business.¹⁶⁷

158. *Id.* at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

159. *Id.*

160. 167 A.D.2d 370, 561 N.Y.S.2d 600 (2nd Dep't 1990).

161. *Id.* at 371, 561 N.Y.S.2d at 601.

162. *Id.* (noting N.Y. TOWN LAW § 190 (McKinney 1987)).

163. *Id.*; see also *Town of Orangetown v. Magee*, N.Y. L.J., Dec. 30, 1992, at 30 (Sup. Ct. Rockland Co., Stolarik, J.) (reversing denial of a building permit because of clear evidence that the denial was based on the local officials' desire to placate constituents rather than to further legitimate public purposes).

164. *Kraizberg*, 167 A.D.2d at 371, 561 N.Y.S.2d at 601.

165. 49 Misc. 2d 104, 266 N.Y.S.2d 833 (Sup. Ct. Oneida County 1966).

166. *Id.* at 108, 266 N.Y.S.2d at 389. See *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951) (single parcel rezoning is not illegal spot zoning if it is in accord with sound planning principles); see *infra* notes 177-91 and text accompanying.

167. *Walus*, 49 Misc. 2d at 105, 266 N.Y.S.2d at 836.

Other than a few nonconforming uses within the general vicinity, the area was primarily developed as a single-family residential neighborhood. The application for reclassification was to allow the construction of a restaurant and eventually a motel.¹⁶⁸

The appellate division invalidated the rezoning because it was not in accordance with the "comprehensive plan" of the community. The court stated that "an underlying purpose [of comprehensive planning is] to control land uses for the benefit of the whole community based upon consideration of the community's problems and . . . a general policy to obtain a uniform result."¹⁶⁹ In addition, "it requires a consideration of the individual parcel's relationship to the community as a whole."¹⁷⁰ "[T]he requirement is that a plan be implicit in the zoning regulation as a whole and that the amendments be consistent with such [a] plan and not be enacted on a piecemeal or haphazard basis."¹⁷¹ Therefore, if the amendment benefits the community as a whole, any incidental benefit or detriment to the owners or neighboring property does not invalidate the legislation.

These three cases, *McMinn*, *Kraizberg*, and *Walus*, illustrate the vulnerability of regulations that are not clearly connected to the advancement of an objective of a comprehensive plan.¹⁷² In *McMinn*, there was no evidence that the regulatory means chosen by the town advanced a valid planning objective.¹⁷³ In *Kraizberg*, the dangers of not integrating local plans, such as the capital infrastructure budget, the official map and the comprehensive plan were demonstrated.¹⁷⁴ In *Walus*, it was fatal to a regulation that it was not part of the planning whole but was instead enacted on a piecemeal or haphazard basis.¹⁷⁵ In

168. *Id.*

169. *Id.* at 108, 266 N.Y.S.2d at 839; *see also* *Cannon v. Murphy*, 600 N.Y.S.2d 965 (2d Dep't 1993).

170. *Id.* at 109, 266 N.Y.S.2d at 839 (citing *Connell v. Town of Granby*, 12 A.D.2d 177, 209 N.Y.S.2d 379 (4th Dep't 1961)).

171. *Id.*

172. *See also* *South Gwinett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S. 837 (1974). "It necessarily follows that upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness." *Id.* at 7.

173. *See supra* note 112 and accompanying text.

174. *See supra* note 50 and accompanying text.

175. *See supra* note 137 and accompanying text.

each of these cases, there was no evidence that the regulations were enacted to further a specific public planning objective. The courts in these cases cautioned municipalities from regulating in the absence of conscientious planning.

C. *Procedural Due Process*

Land use regulations must adhere to procedural guarantees secured by the Due Process Clause of the Fifth Amendment of the U.S. Constitution.¹⁷⁶ Procedural due process concerns the "process" that is followed in the adoption of regulations that affect property rights. Apart from the substantive content of a regulation, it must be adopted and administered in a way that treats affected interests fairly, giving them notice and a reasonable chance to be heard before a tribunal that is accessible and impartial.

The failure of an agency to follow an orderly and logical process in enacting a land use regulation can be fatal to a regulation's validity. Recall that in *Udell* the rezoning was not "accomplished in a proper, careful and reasonable manner."¹⁷⁷ Similarly, in *Pokoik v. Silsdorf*,¹⁷⁸ the town's dilatory tactics resulted in the invalidation of the rezoning of plaintiff's property. The plaintiff sought to annul the decision of the building inspector and town zoning board of appeals that denied a building permit.¹⁷⁹ The plaintiff's application for a building permit to construct two additional bedrooms was originally rejected because of previous zoning violations.¹⁸⁰ The plaintiff revised the building plans, but the building inspector did not act upon them. A court order compelling the building inspector's action on the application was granted nine months later, but the application was denied three months after issuance of the order.¹⁸¹ The plaintiff appealed to the zoning board of appeals, but was forced to reschedule the hearing because no one appeared on be-

176. See *supra* note 150.

177. See *supra* note 141.

178. 40 N.Y.2d 769, 358 N.E.2d 874, 390 N.Y.S.2d 49 (1976).

179. *Id.* at 770, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

180. *Id.* Plaintiff violated the zoning restrictions by renting rooms in a residential district without a license. Moreover, the application for a building permit did not explain why plaintiff needed the additional room. Thus, the application was rejected. *Id.*

181. *Id.*

half of the town. Meanwhile, the town board of trustees amended the zoning ordinance, limiting one-family residences to four bedrooms. This was a new requirement that would be violated by the plaintiff's revised plans.¹⁸² The ordinance became effective prior to the plaintiff's hearing, resulting in the denial of the building permit. The special term annulled this decision, but the appellate division reversed, finding the amended ordinance controlling because it was effective at the time of the hearing.¹⁸³

The Court of Appeals reversed, holding that the amended ordinance could not apply, and finding that the dilatory tactics of the town board and building inspector were a "special facts exception" to the rule that zoning amendments may be made at anytime in the public interest.¹⁸⁴ The plaintiff's full compliance with the zoning requirements at the time of the revised application created a right to the permit. The plaintiff was denied his right to begin construction before the effective date of the amendment because of the "abuse of administrative procedure" by the village officials.¹⁸⁵ The Court held that where a town board has abused administrative procedures in amending its zoning ordinance, that amendment may not be used to invalidate an application for a permit.¹⁸⁶

The faulty proceedings in *Pokoik* are symptomatic of what happens when land use is regulated in the absence of systematic planning, of clear objectives and of a determined and demon-

182. *Id.* at 771, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

183. *Id.* at 772, 358 N.E.2d at 876, 390 N.Y.S.2d at 51.

184. *Id.* at 772-73, 358 N.E.2d at 876, 390 N.Y.S.2d at 51.

185. *Id.* at 773, 358 N.E.2d at 876, 390 N.Y.S.2d at 51.

186. *Id.*, 358 N.E.2d at 876-77, 390 N.Y.S.2d at 51-52; *see also* *Golisano v. Town Bd.*, 31 A.D.2d 85, 296 N.Y.S.2d 623 (4th Dep't 1968). The absence of comprehensive planning principles to justify a rezoning was transparent in the court's analysis of the denial of the plaintiff's application for a building permit. The court noted that the town board had cited fifteen reasons for denial of the permit, but these were "groping" and without merit because no rationale for rezoning to increase the size of a building lot was given. *Id.* at 88, 296 N.Y.S.2d at 626. The town board "abused administrative procedure" by trying to conceal its desire to delay the application with insufficient reasons for denial. *Id.* Due to this abuse, the court invoked the "special facts exception." *Id.* It held that where a town board has abused administrative procedures in the exercise of its zoning powers, this "special facts exception" will prevent a subsequent zoning amendment from justifying a denial of the plaintiff's application for a permit. *Id.* Thus, the amended ordinance did not apply and the arbitrary decision of the board was annulled. *Id.*, 296 N.Y.S.2d at 627.

strable strategy to achieve them. Operating in a planning void heightens the risk of having a court characterize the operating method as dilatory and abusive, a violation of the guarantee of procedural due process. This reinforces the historical reliance on planning before regulation and proceeding according to that plan.

D. *Equal Protection Violation*

Udell v. Haas further established that a land use regulation may not discriminate unfairly against a particular owner or class of owners in violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.¹⁸⁷ This guarantee provides a landowner with the ability to attack the validity of a land use regulation in two ways, either by attacking the regulation on its face or by attacking the regulation as applied to a plaintiff's land.¹⁸⁸

In *Osiecki v. Town of Huntington*,¹⁸⁹ a regulation that departed from the comprehensive plan was invalidated for failure to articulate planning reasons for the deviation. In this 1991 case, the plaintiffs challenged the low-density residential classification of their five and one-half acre parcel. The plaintiffs claimed a violation of their equal protection rights, pointing to nearby properties that were zoned and developed commercially in conformance with a master plan adopted in 1965.¹⁹⁰ The plan designated the entire block, including the subject property, for commercial development.¹⁹¹

187. *Udell*, 21 N.Y.2d at 477-78, 235 N.E.2d at 906, 288 N.Y.S.2d at 900-01. The Fourteenth Amendment states that "[n]o State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; see also N.Y. CONST. art. I, § 11. Owners may contest the regulation of their property if they have evidence that similarly situated properties are not so affected. Equal protection attacks may also be brought on other grounds, such as race, poverty or age. Equal protection attacks on land use regulation are often intertwined with charges that such regulations violate the plaintiff's constitutional due process rights. See MANDELKER, *supra* note 150, at 61.

188. If there is no logical difference between plaintiff's property and an adjacent property which was classified more favorably, then the regulation is attacked as applied to plaintiff's land. See *supra* note 133 and accompanying text.

189. 170 A.D.2d 490, 565 N.Y.S.2d 564 (2d Dep't 1991).

190. *Id.* at 490, 565 N.Y.S.2d at 565.

191. *Id.* at 491, 565 N.Y.S.2d at 565.

Using the vocabulary of other comprehensive plan cases, the town argued that it was not obliged to “slavish servitude to the master plan” and that it could change the use of the plaintiffs’ property.¹⁹² A search of the record showed no reason articulated by the town justifying a departure from the adopted plan. As a result, the zoning of plaintiff’s property was voided since it was not in compliance with comprehensive planning. Otherwise, “[t]o accept the Town’s contention that it is free to determine that the master plan should no longer be followed, without articulating a reason for that determination, would invite the kind of ad hoc and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid.”¹⁹³

City of Cleburne v. Cleburne Living Center Inc.,¹⁹⁴ involved a city ordinance that prevented a group home from being placed in the community. The Court considered whether the mentally retarded constituted a quasi-suspect class meriting an intermediate level of judicial scrutiny, somewhere between the strict scrutiny applied to regulations affecting a constitutionally protected, or “suspect” class, and the rational relationship standard applied to groups not specially protected by the Constitution.¹⁹⁵

The plaintiff sought to lease a building for operation as a group home for mentally handicapped individuals. The city zoning ordinance required an application for a special permit to establish a “hospital for the feebleminded.”¹⁹⁶ The plaintiff applied for a special permit, was denied and argued that the denial violated equal protection and due process guarantees because similar uses did not require a special permit.

The Supreme Court found that mental retardation was not a “quasi-suspect classification” and refused to apply heightened

192. *Id.*

193. *Id.*

194. 473 U.S. 432 (1985). *Cleburne* is a seminal federal case arising out of a zoning dispute in Texas.

195. *Id.* at 435. Under the rational relationship standard, the most relaxed standard of judicial review, the courts will uphold the land use scheme if there exists any rational basis for its imposition upon the subject property. The rational relationship test is the most common standard applied by the courts; because of the presumption of validity given to regulations, it is infrequent that regulations are set aside when this standard is used. BLACK’S LAW DICTIONARY 1262 (6th ed. 1990).

196. *Cleburne*, 473 U.S. at 436-37.

scrutiny to review the regulation.¹⁹⁷ Instead, the Court stated that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."¹⁹⁸ Using this standard, the Court found that the special permit requirement violated equal protection because other similar uses did not require such a special use permit. Based on the proofs submitted, the Court found that there was no rational basis for believing that the use would "pose any special threat to the city's legitimate interests."¹⁹⁹ Again, the failure to tie these matters to the objectives of a comprehensive plan, and to show how they furthered such objectives, was fatal to the regulation.

E. *Ultra Vires*

Finally, *Udell* demonstrated that the enactment of a land use regulation must be within the powers that have been delegated to the regulator through an enabling statute.²⁰⁰ In *Moriarty v. Planning Board*,²⁰¹ the power of a planning board to review a site plan was strictly construed, so as to deny the board powers that were expressly granted to the building inspector.

In *Moriarty*, the plaintiff proposed to build a metal fabricating plant on a vacant parcel of industrially-zoned property.²⁰² The existing zoning ordinance required site plan approval by the village planning board before any building permit could be issued. After submitting an application, the site plan approval was denied because of inadequate fire protection mechanisms. The question on appeal was not the "reasonableness" of the planning board's actions, but whether the planning board was empowered to deny site plan approval because of fire protection concerns.²⁰³

The court, strictly interpreting the scope of delegated powers,²⁰⁴ found that the Planning Board was not empowered to

197. *Id.* at 442.

198. *Id.* at 446.

199. *Id.* at 448.

200. *Udell*, 21 N.Y.2d at 469, 235 N.E.2d at 900-01, 288 N.Y.S.2d at 893-94.

201. 119 A.D.2d 188, 506 N.Y.S.2d 184 (2d Dep't 1986).

202. *Id.* at 189, 506 N.Y.S.2d at 185.

203. *Id.* at 189-90, 506 N.Y.S.2d at 185.

204. The court held that:

deny the building permit because fire code requirements were not met. The court stated that “[z]oning laws are . . . in derogation of common-law property rights and thus are subject to the long-standing rule requiring their strict construction.”²⁰⁵ Because the state legislature did not empower the board to assume the powers of local fire inspectors in denying building permits due to inadequate fire protection, the court annulled the board’s denial of the application.²⁰⁶

Similarly, in *Udell*, the failure of the regulation to conform to the comprehensive plan was sufficient to show that it was not within the scope of the municipality’s delegated powers.²⁰⁷ The lessons taught by the courts in *Udell* and the cases cited above strongly suggest that failing to conform land regulations to comprehensive planning enhances the success of all four lines of attack available to property owners.

IV. The Planning Antidote to Legal Challenges of Land Use Regulations

A. *The Regulatory Takings Challenge: A Fifth Line of Attack*

One important claim not advanced by the plaintiff in *Udell* was that the rezoning of his property constituted a regulatory taking. Similar claims are litigated so vigorously today that the forces arrayed against land use regulations are classified as a “movement.”²⁰⁸ Seeds of confusion in distinguishing a regulation

a planning board may not vary zoning regulations at all without explicitly being delegated such power, nor may it deny site plan approval on the ground that the proposed use is not permitted under the zoning ordinance because the power to interpret the zoning ordinance is vested in the building inspector and the Zoning Board of Appeals.

Id. at 196-97, 506 N.Y.S.2d at 190 (citations omitted).

205. *Id.* at 195, 506 N.Y.S.2d at 188-89 (construing *FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 485 N.E.2d 986, 495 N.Y.S.2d 321 (1985)).

206. *Id.* at 199, 506 N.Y.S.2d at 191.

207. See *supra* text accompanying notes 129-131.

208. See Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1 (referring to “an increasingly militant property rights movement”); Keith Schneider, *Environmental Laws Face Stiff Test From Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1; see also, The Private Property Rights Act of 1991, S.50, 102d Cong., 1st Sess. (1991). This act is evidence of the rigorous efforts of property rights efforts in the legislative arena. If enacted, this bill would have required federal agencies to conduct a “Takings Impact Analysis,” that is, to assess whether regulations that they adopt might result in a taking of private property, and to avoid such an

from a taking of property under the Fifth Amendment were first sown in 1922, when Justice Holmes stated "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁰⁹ For a half century thereafter the Court entertained no occasion to explain how to determine when a regulation could become a taking by going too far. Beginning in 1978²¹⁰ and culminating in 1987 in a trilogy of cases,²¹¹ the Court struggled with this issue, piercing little of its enigmatic nature.²¹² Since the U.S. Supreme Court decided *Euclid v. Ambler* in 1926, it has reviewed challenges to regulations that arbitrate burdens and benefits among property owners giving great deference to the regulator, striking down regulations rarely and only when the challenger can prove conclusively that the regulation in question has "no substantial relation to the public health, safety, morals, or general welfare"²¹³ or that the regulation results in a denial of "all economically beneficial or productive use of the land."²¹⁴

It was in the context of a case challenging a rezoning of the plaintiff's property that the Supreme Court articulated the test by which regulations are judged to determine whether they are takings. In *Agins v. City of Tiburon*,²¹⁵ which involved a land-

effect, where possible. See Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), which administratively imposed the same required actions on federal agencies that the Act would have.

209. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

210. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

211. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

212. "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of [the] Court's takings jurisprudence." *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting).

213. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."); see *supra* note 30. Compare *Gorrie v. Fox*, 274 U.S. 603, 608 (1927) ("[C]ity councils . . . are better qualified than the courts [to make these determinations].") and *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) ("[I]t is impossible for us to say that [this zoning decision] was clearly arbitrary and unreasonable."), where regulations were upheld using this approach, with *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), where a challenger overcame this presumption of validity by proving affirmatively that the regulation bore no relation to advancing a public interest.

214. *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886, 2893 (1992).

215. 447 U.S. 255 (1980).

owner's challenge to the city's zoning ordinance, the Court framed a two-pronged test, drawing from two of its earlier cases. Zoning "effects a taking if the ordinance (1) 'does not substantially advance a legitimate state interest' or (2) if it 'denies an owner economically viable use of his land.'"²¹⁶

The Supreme Court in *Agins* articulated a standard set of considerations for courts to use when they review takings challenges in the context of a challenge to a local zoning provision:

1. On its face, is the "'justice and fairness' guaranteed by the Fifth and Fourteenth amendments" respected by the regulation?²¹⁷

2. The principal indicator of fairness is "in essence, a determination that the public at large, rather than a single owner, must bear the burden"²¹⁸

3. An additional indicator that fairness is effected is that the regulation involves reciprocal benefits to the landowner and the public.²¹⁹

4. Since "no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests,"²²⁰ particularly in close cases.

5. The public "benefits must be considered along with any diminution in market value" of the affected property.²²¹

6. Determinations of the legislature regarding the first prong of the *Agins* test, the legitimacy of the public interest, will be "clothed with a strong presumption of constitutionality."²²²

216. *Id.* at 260 (citing *Nectow*, 277 U.S. at 188 and *Penn Central*, 438 U.S. at 138 n.36). Compare this standard to that used by the court in *McMinn v. Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

217. *Id.* at 263 (citing *Penn Central*, 438 U.S. at 124).

218. *Id.* at 260; *Lucas v. South Carolina Coastal*, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting). Justice Stevens characterized this notion as follows: "Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution of value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land use plan." *Id.* at 2923.

219. *Agins*, 447 U.S. at 262.

220. *Id.* at 260-61 (citation omitted).

221. *Id.* at 262.

222. See *Curtiss-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551, 553, 442 N.Y.S.2d 125, 127 (2d Dep't 1981) (citing *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 344, 414 N.E.2d 680, 682, 434 N.Y.S.2d 180, 182 (1980); *Marcus Assoc. v. Town of Huntington*, 45 N.Y.2d 501, 505, 382 N.E.2d 1323, 1324, 410 N.Y.S.2d 546, 547 (1978); *McGowan v. Cohalan*, 41 N.Y.2d 434, 436, 361 N.E.2d 1025,

7. Implicit in the presumption of validity is that the challenger of the regulation must bear the burden of proving its invalidity. This is particularly difficult, with respect to the first prong, due to the presumption.

These rules, derived from seminal cases, demonstrate the operating method adopted by a court that perceives itself to be working within the "stable core" of regulatory takings law.²²³ That operating method is deferential to a legislature that is pursuing a comprehensive plan for the municipality, meting out burdens on landowners generally for the overall benefit of the community. The court's sense of justice is not offended by a severe and demonstrated diminution in value, or by the methods used or objectives pursued by the regulators.

To the extent that the legislative body has tied a regulation to a clearly stated plan, one that spells out the public interest pursued, the regulation will have a better chance of surviving whatever level of scrutiny a court decides to apply. In fact, it can be argued that a court is likely to select the standard of review it will apply depending on its sense of the seriousness of the public purpose advanced by it. The plan, if drafted with integrity, and properly advanced by the regulation, can greatly influence such matters.

The conclusions drawn from a close reading of *Udell* and this brief discussion of regulatory takings cases are sustained by a review of the decisions of the New York courts that routinely sustain zoning regulations that are clearly supported by sound planning rationale. Several of these cases, and the importance they place on conforming regulations to planning, are discussed

1026, 393 N.Y.S.2d 376, 378 (1977); *Dauerheim, Inc. v. Town Bd.*, 33 N.Y.2d 468, 473, 310 N.E.2d 516, 519, 354 N.Y.S.2d 909, 914 (1974)). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), the Court wrote:

If these reasons . . . do not demonstrate the wisdom . . . of those restrictions . . . , at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.

Id.; see also, *Agins*, 447 U.S. at 261 ("[E]xercises of the city's police power to protect [its] residents . . . have long been recognized as legitimate.") (footnote omitted).

223. See John Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 1, 25 (1992), citing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 99 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

below.²²⁴

B. *Compliance With A Comprehensive Plan Validates Land Use Regulations*

*Dur-Bar Realty Co. v. City of Utica*²²⁵ illustrates how compliance with a comprehensive plan will save even the most burdensome land regulations. In *Dur-Bar*, the plaintiff sought to invalidate portions of the city zoning ordinance that created a "Land Conservation District."²²⁶ The subject parcel was located completely within the flood plain of a river classified as a "Land Conservation District" by the city zoning ordinance.²²⁷ The plaintiff made two applications for special permits, but both were denied because the location within the flood plain required large amounts of landfill.²²⁸ Subsequently, the plaintiff brought suit, claiming that the ordinance was not "in accord with a well considered plan" and beyond the power of the enabling legislation.²²⁹

The pivotal issue for the appellate division was whether the denial of the special permit furthered the "well considered plan." The court found the city ordinance to be "comprehensive . . . containing detailed use provisions and a carefully drawn map" that demonstrated "orderly and painstaking forethought."²³⁰ The ordinance also contained evidence that it was "based on the Master Plan for the City of Utica."²³¹ The "Land

224. For a review of regulatory takings cases and a discussion of the standards of review applied to various types of takings cases, *see id.*

225. 57 A.D.2d 51, 394 N.Y.S.2d 913 (4th Dep't 1977).

226. *Id.* at 52, 394 N.Y.S.2d at 915.

227. *Id.* Utica's ordinance created fourteen zoning districts. *Id.* The "Land Conservation District" permitted only limited special uses: (1) farm and other agricultural operations; (2) parks, golf courses, athletic facilities; (3) essential services; (4) disposal facilities and landfill operations; and (5) marinas. *Id.* at 52-53, 394 N.Y.S.2d at 915.

228. *Id.* at 53, 394 N.Y.S.2d at 915. This required a permit from the New York Department of Environmental Conservation, but this agency advised the planning board that the permit would never be issued due to the location of the parcels within the flood plain. *Id.*

229. *Id.* at 53, 394 N.Y.S.2d at 915-16 (quoting N.Y. GEN. CITY LAW § 20(25) (McKinney 1987)).

230. *Id.*, 394 N.Y.S.2d at 916; *see also* N.Y. GEN. CITY LAW § 20(25) (McKinney 1987) ("Such regulations . . . shall be made . . . in accord with a well considered plan . . .").

231. *Dur-Bar Realty Co.*, 57 A.D.2d at 53, 394 N.Y.S.2d at 916 (citing UTICA ZONING

Conservation District" was created after carefully assessing the character of the land in light of protecting the public from hazards that would result from "intensive development" of the area.²³² The district presented a number of problems, such as drainage and topography, that could have jeopardized the health and safety of the community. In addition, adequate standards existed to guide the Board in issuing special permits.²³³ The court held that where adequate standards exist in issuing special permits for specific areas to further the comprehensive planning strategy of the community, the zoning ordinance will not be *ultra vires*.²³⁴

In *McBride v. Town of Forestburgh*,²³⁵ the plaintiffs challenged the constitutionality of a town zoning ordinance requiring one-acre lots for the development of mobile homes. The plaintiffs submitted a preliminary plot plan to the town board and the planning board for the development of a mobile home park.²³⁶ When this plan was submitted, the planning board had no regulations governing the submission of such plans. Likewise, there were no effective zoning provisions regulating mobile home parks at that time, but only the recommendations of the planning board for a minimum one-acre subdivision restriction.²³⁷

ORDINANCE §§ 1.300, 1.500-1.590 (1967)).

232. *Id.* at 54-55, 394 N.Y.S.2d at 916. *But see* *Marshall v. Village of Wappingers Falls*, 28 A.D.2d 542, 542, 279 N.Y.S.2d 654, 655-56 (2d Dep't 1967) (holding that regulating development by special permit in a "Planned Residential District" is not "comprehensive planning," but simply a procedure providing for decisions on a lot-by-lot basis). The court distinguished this case because the character of the district in *Wappingers Falls* was not so unusual in topography or location as to justify special use permits. *Dur-Bar Realty Co.*, 57 A.D.2d at 54, 394 N.Y.S.2d at 916. The Wappingers Falls procedure was a substitute for "comprehensive planning," while the procedure used in Utica "was chosen in furtherance of comprehensive planning." *Id.* at 55, 394 N.Y.S.2d at 916-17.

233. *Dur-Bar Realty Co.*, 57 A.D.2d at 55-56, 394 N.Y.S.2d at 917. The proposed use was required to be:

'designed, located, and . . . be operated [so] that the public health, safety, welfare, and convenience will be protected'; that the use not substantially injure the value of the neighboring property; that it be compatible with adjoining development and the proposed character of the district; and that it conform to 'all applicable regulations governing the district where located.'

Id. at 56, 394 N.Y.S.2d at 917 (citing *UTICA ZONING ORDINANCE* §§ 6.600, 9.500 (1967)).

234. *Id.* at 54-55, 394 N.Y.S.2d at 916-17.

235. 54 A.D.2d 396, 388 N.Y.S.2d 940 (3d Dep't 1976).

236. *Id.* at 397, 388 N.Y.S.2d at 941-42.

237. *Id.*, 388 N.Y.S.2d at 942.

After this application was rejected, a mobile home ordinance requiring minimum lots of one-acre was enacted. The plaintiffs brought this action to declare the ordinance ineffective because their application preceded the adoption of the plan.²³⁸ The trial court upheld the ordinance as constitutional and not violative of the plaintiffs' due process rights.²³⁹ The plaintiffs maintained that the zoning ordinance was *ultra vires* as not in accord with a comprehensive plan and appealed the decision of the trial court.²⁴⁰

The appellate division upheld the ordinance as enacted and held that it was not *ultra vires*.²⁴¹ The court stated that "the requirements of the enabling statute are met if implicit in the ordinance there is the element of planning which is both rational and consistent with the basic land use policies of the community."²⁴² The existence of planning prior to the adoption of the ordinance, the rustic nature of the community and other factors were sufficient to define the community's comprehensive plan.²⁴³ Thus, the ordinance was not *ultra vires*.

The plaintiff in *Daum v. Meade*²⁴⁴ owned a residentially improved parcel adjacent to an area that the town rezoned as a "Planned Industrial Park."²⁴⁵ Prior to the rezoning, the town board had commissioned a planning study as the basis for a proposed "master plan."²⁴⁶ That study was not completed prior to the rezoning of the subject property.²⁴⁷ The plaintiff challenged

238. *Id.*

239. *Id.* at 397-98, 388 N.Y.S.2d at 942.

240. *Id.* The plaintiffs also contended that they would suffer undue economic injury if the ordinance was not invalidated, that the ordinance was unconstitutional as it applied to them, and that the ordinance abrogated their vested rights in the property as zoned prior to the enactment. *Id.* at 398-99, 388 N.Y.S.2d at 942-43.

241. *Id.* at 398, 388 N.Y.S.2d at 942.

242. *Id.* (citing 1 ROBERT M. ANDERSON, NEW YORK ZONING LAW AND PRACTICE, § 5.02 (2d ed. 1973)).

243. *Id.*

244. 65 Misc. 2d 572, 318 N.Y.S.2d 199 (Sup. Ct. Nassau County 1971).

245. *Id.* at 572-73, 318 N.Y.S.2d at 200. The property was the site of sand excavation mines; the county had condemned and acquired title to the most northerly 650 acres of defendant's property. *Id.* at 573, 318 N.Y.S.2d at 201. Subsequently, the town sought to amend the building zone ordinance and map to create the new district and apply it to this newly acquired parcel. *Id.* at 574-75, 318 N.Y.S.2d at 202.

246. *Id.* at 575, 318 N.Y.S.2d at 203.

247. *Id.*

this action as "not made in accord with a 'comprehensive plan.'" ²⁴⁸ The plaintiff argued that the term "comprehensive plan" as stated in section 263 of the Town Law meant the "master plan" that was commissioned by the Town Board. ²⁴⁹

The court disagreed with the plaintiff's interpretation of a "comprehensive plan;" it stated that a comprehensive plan "can be found by examining all the relevant evidence," ²⁵⁰ including especially "the [town's] zoning law itself and the zoning map." ²⁵¹ The court affirmed that zoning should "not conflict with the fundamental land use policies and development plans of the community" ²⁵² that "may be garnered from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map." ²⁵³ Since these sources identified the need to provide sites for industrial growth, pointed to the increasing scarcity of land available for that purpose, and justified the development of the subject parcel to help satisfy those needs, the court found that the parcel's rezoning was in accordance with comprehensive planning. ²⁵⁴

In *Rodgers v. Village of Tarrytown*, ²⁵⁵ the plaintiff questioned the validity of two amendments to the village's zoning ordinance that created a new district permitting multiple-family dwellings in single-family districts. ²⁵⁶ The first amendment created a new zoning district, yet the district's boundaries were "to be fixed by amendment of the official building zone map" when future applications for this district were reviewed and approved. ²⁵⁷ Standards specifying the size and physical layout of developments under this zoning were prescribed. ²⁵⁸ The second

248. *Id.*

249. *Id.*

250. *Id.* at 576, 318 N.Y.S.2d at 203 (quoting *Udell v. Haas*, 21 N.Y.2d 463, 471, 235 N.E.2d 897, 902, 288 N.Y.S.2d 888, 895 (1968)).

251. *Id.* (quoting *Udell*, 21 N.Y.2d at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896).

252. *Id.*

253. *Id.*, 318 N.Y.S.2d at 203 (quoting *Udell*, 21 N.Y.2d at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896).

254. *Id.*, 318 N.Y.S.2d at 204.

255. 302 N.Y. 115, 96 N.E.2d 731 (1951).

256. *Id.* at 120, 96 N.E.2d at 732.

257. *Id.*

258. *Id.*, 96 N.E.2d at 732-33. For example, this amended ordinance designated maximum building height, setback requirements and ground area of the plots to be occu-

amendment was the village's response to an application for rezoning by the plaintiff's neighbor. After "repeated modifications . . . to meet the suggestions of the village planning board," approval was ultimately given.²⁵⁹

The court of appeals stated that "[w]hile stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static" when "[c]hanged or changing conditions call for changed plans."²⁶⁰ The court stressed: "[a] decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary. . . ."²⁶¹ Therefore, "[i]f the validity of the legislative classification . . . be fairly debatable, the legislative judgment must be allowed to control."²⁶²

It is upon this foundation that the court upheld the two zoning amendments because they accorded with sound zoning principles, complied with every requirement of law, and were accomplished in a proper, careful and reasonable manner.²⁶³ The village board of trustees was entitled to find that creating the new districts for garden apartment developments would prevent young families from moving elsewhere, would attract business to the community, would lighten the tax-load on the small homeowner, and would develop otherwise unmarketable and decaying property.²⁶⁴

The court also found that any allegations of "spot-zoning" were "without substance."²⁶⁵ "Spot-zoning" is "defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the

plied by the buildings. *Id.*

259. *Id.*, 96 N.E.2d at 733.

260. *Id.* at 121, 96 N.E.2d at 733. Private interests must bow to public concerns if contrary to such classification since "the power of a village to amend its basic zoning ordinance . . . to promote the general welfare cannot be questioned." *Id.*

261. *Id.*

262. *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

263. *Id.* at 122, 96 N.E.2d at 733.

264. *Id.*

265. *Id.* at 123, 96 N.E.2d at 734; *See Walus v. Millington*, 49 Misc. 2d 104, 266 N.Y.S.2d 833 (Sup. Ct. Oneida County 1966) (failure to show reasons for deviating from the plan constituted spot zoning).

benefit of the owner of such property and to the detriment of other owners."²⁶⁶ The court stated that an ordinance enacted in accordance with a comprehensive zoning plan is not "spot-zoning," even though it may single out one small plot,²⁶⁷ or create small areas or districts in the center of a large zone devoted to different uses.²⁶⁸ The relevant inquiry was not "whether the particular zoning under attack consist[ed] of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."²⁶⁹ The court upheld the validity of the two amendments because they were applied to the entire territory of the village²⁷⁰ and they were "in accord with the comprehensive plan" for the community.²⁷¹

*Randolph v. Town of Brookhaven*²⁷² and *Place v. Hack*²⁷³

266. *Rodgers*, 302 N.Y. at 123, 96 N.E.2d at 734.

267. *Id.* at 124, 96 N.E.2d at 735; *see, e.g., Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1945).

268. *Rodgers*, 302 N.Y. at 124, 96 N.E.2d at 735; *see, e.g., Nappi v. LaGuardia*, 295 N.Y. 652, 64 N.E.2d 716 (1945) (a business area was created within a residential zone).

269. *Rodgers*, 302 N.Y. at 124, 96 N.E.2d at 735.

270. *Id.* at 125, 96 N.E.2d at 735-36. The ordinances provided the same rights and privileges to every owner of at least ten acres. *Id.* at 122-23, 96 N.E.2d at 736.

271. *Id.* In the dissenting opinion, Judge Conway found the action of the board of trustees of the village beyond its power to act under the Village Law. First, the dissent argued that the "plain language" of section 176 of the Village Law made it essential that "physical boundaries" be established for the district. *Id.* at 127, 96 N.E.2d at 737 (Conway, J., dissenting). In essence, the reference to "districts" or "zones" in the ordinance was meaningless without the creation of specified boundaries. *Id.* Second, the dissent stressed that the action of the board could not be considered as "in accordance with a comprehensive plan." *Id.* at 128, 96 N.E.2d at 737 (quoting N.Y. VILLAGE LAW § 177 (McKinney 1940) (current version at N.Y. VILLAGE LAW § 7-704 (McKinney 1973 & Supp. 1993))). The lack of investigation by the village to determine areas suitable for multiple-family dwellings, the absence of standards for the type of construction necessary and the obvious benefit to titleholders of ten acre parcels who may wish to avail themselves of the ordinance did not constitute "comprehensive planning" by the board. *Id.* at 128, 96 N.E.2d at 737. This was "spot-zoning at the request of landed interests who . . . find favor with the board." *Id.* The "substance" of the two amendments allowed a non-conforming use in an established zone. This required a variance, which could not be determined by the Village Board of Trustees since variances were within the sole discretion of the Zoning Board of Appeals. Therefore, "the particular method adopted by the Board was [not] in conformity with the legislative requirements found in the Village Law, and [outside] proper zoning theory and practice." *Id.* at 130, 96 N.E.2d at 738.

272. 37 N.Y.2d 544, 337 N.E.2d 763, 375 N.Y.S.2d 315 (1975).

273. 34 Misc. 2d 777, 230 N.Y.S.2d 583 (Sup. Ct. Wayne Co. 1962); *see also Daum v.*

exemplify the importance of forethought in zoning actions. In *Randolph*, evidence of forethought helped support the reasonableness of a controversial rezoning of a mixed-use area.²⁷⁴ Similarly, in *Place* evidence of forethought supplemented other evidence to prove that there was a comprehensive planning rationale that justified the major rezoning.²⁷⁵

In *Randolph*, the plaintiff challenged the rezoning of his neighbor's property from "single-family dwelling" to "multiple-family dwelling."²⁷⁶ The issue on appeal was whether the "zoning amendment was made 'in accordance with a comprehensive plan' as required by section 263 of the Town Law."²⁷⁷ The Court of Appeals repeated the rule that a "'comprehensive plan' is to be found by examining all the relevant evidence."²⁷⁸ The court reviewed the existing pattern of zoning, as embodied in the zoning ordinance and the zoning map. This evidence demonstrated that the pattern of zoning was intended to protect the single-family residential areas west of the subject parcel by a discrete barrier.²⁷⁹ The subject parcel was an "exception" because the pre-amended ordinance permitted the construction of single-family residences in this "intervening barrier."²⁸⁰ The Town Board found that the development permitted by the amended ordinance would represent an excellent transition between the highway and the residential area, in a manner consistent with past practices relative to adjacent areas.²⁸¹ The court concluded that . . . "forethought [was] given to the community's land use problems" and that . . . an adequate 'showing [was made] that the change does not conflict with the community's basic scheme for land use.' "²⁸² The court also held that "what is mandated is [the] comprehensiveness of planning, [not] special interest, irra-

Mead, 65 Misc. 2d 572, 318 N.Y.S.2d 199 (Sup. Ct. Nassau Co. 1971) (examining all relevant evidence and finding the major rezoning supported by a valid planning objective).

274. *Randolph*, 37 N.Y.2d at 546, 337 N.E.2d at 764, 375 N.Y.S.2d at 316-17.

275. *Place*, 34 Misc. 2d at 783, 230 N.Y.S.2d at 589-90.

276. *Randolph*, 37 N.Y.2d at 545, 337 N.E.2d at 763-64, 375 N.Y.S.2d at 316.

277. *Id.* at 547, 337 N.E.2d at 764, 375 N.Y.S.2d at 317.

278. *Id.* (citing *Udell*, 21 N.Y.2d at 471, 235 N.E.2d at 901, 288 N.Y.S.2d at 895).

279. *Id.*, 337 N.E.2d at 764-65, 375 N.Y.S.2d at 317-18.

280. *Id.*

281. *Id.*, 337 N.E.2d at 765, 375 N.Y.S.2d at 318.

282. *Id.* (citing *Udell*, 21 N.Y.2d at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894).

tional ad hocery.”²⁸³ Therefore, “a sufficient degree of comprehensiveness of planning . . . [was] demonstrated and [the] amendment [was] in conformity with such planning.”²⁸⁴

In *Place v. Hack*,²⁸⁵ the plaintiffs sought to invalidate a zoning amendment that created an industrial district adjacent to their properties.²⁸⁶ They alleged that the amended ordinance did not accord with the “comprehensive plan,” and sought to enjoin such use of the property.²⁸⁷ The dispositive issue for the court was whether the zoning ordinance conformed to the “comprehensive plan” for the community.²⁸⁸ The court stated that a “comprehensive plan”:

“[I]s not necessarily a ‘master plan’ such as might be drafted by a municipality before embarking on a program of capital improvements; . . . nor need it be a written plan The comprehensive plan in New York and most jurisdictions is neither a written document nor a ‘plan’ in the usual sense of the term, unless an underlying purpose to control land use for the benefit of the whole community may be regarded as such.”²⁸⁹

C. *Land Use Regulations Must Be In Accordance With “Current Comprehensiveness of Planning”*

In *Town of Bedford v. Village of Mount Kisco*,²⁹⁰ Bedford challenged Mount Kisco’s adoption of a resolution rezoning a 7.68 acre parcel of the village from one-family residential housing to six-story residential housing.²⁹¹ The parcel in question was an isolated northern section of the village, bounded on three sides by Bedford.²⁹² The village’s rezoning exemplifies the external impacts that one municipality’s land use actions can have on

283. *Id.* (citing *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973)).

284. *Id.*

285. 34 Misc. 2d 777, 230 N.Y.S.2d 583 (Sup. Ct. Wayne County 1962).

286. *Id.* at 778, 230 N.Y.S.2d at 584-85.

287. *Id.*, 230 N.Y.S.2d at 585.

288. *Id.* at 780, 230 N.Y.S.2d at 587.

289. *Id.* at 780, 230 N.Y.S.2d at 587 (quoting David A. Yaffee & Herbert N. Cohen, Notes, *Spot Zoning and the Comprehensive Plan*, 10 SYRACUSE L. REV. 303, 304, 305 (1959) (citations omitted)) (footnotes omitted).

290. 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

291. *Id.* at 182, 306 N.E.2d at 156, 351 N.Y.S.2d at 130-31.

292. *Id.* at 183, 306 N.E.2d at 157, 351 N.Y.S.2d at 132.

another; it also illustrates how frustrating it is for impacted communities, like Bedford in this instance, as they struggle to exercise any influence over their neighbors' decisions.

The Town of Bedford challenged this zoning change as "arbitrary and capricious," pointing out that it was inconsistent with a comprehensive plan adopted by Mount Kisco in 1958.²⁹³ The matter had been disapproved by Mount Kisco's own planning board and had been objected to by the Westchester County Planning Department, as well as neighboring landowners.²⁹⁴ The issue before the Court of Appeals was whether, as a matter of law, the decision of the village board was "arbitrary and capricious."²⁹⁵ It found that although there had been no formal amendment to the comprehensive plan since 1958, there were a number of factors that justified the zoning amendment.²⁹⁶ The zoning resolution itself included a finding that changes in the area since 1958 rendered the newly adopted use in conformity with that plan.²⁹⁷

The court stated that "zoning changes must indeed be consonant with [the] total planning strategy, reflecting consideration of the needs of the community."²⁹⁸ Thus, "[w]hat is mandated is that there be [current] comprehensiveness of planning, rather than special interest, irrational ad hocery."²⁹⁹ Most importantly, the court stressed that "[t]he obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan."³⁰⁰ Therefore, the proper standard is "current comprehensiveness of planning."³⁰¹ Given this standard, it was not an arbitrary determination by the village board of trust-

293. *Id.* at 182-83, 186, 306 N.E.2d at 156, 159, 351 N.Y.S.2d at 131, 135.

294. *Id.* at 186, 306 N.E.2d at 158, 351 N.Y.S.2d at 134.

295. *Id.*

296. *Id.* at 189, 306 N.E.2d at 160, 351 N.Y.S.2d at 136. The Village Board had clearly stated its findings in a formal resolution adopted by it. *Id.* These findings contained the public interest justifications for its action. They included the need for revitalization of the affected area, the increased growth and population in the community, the need for housing to serve increased jobs in the area, and the lack of adverse effects upon the neighborhood. *Id.* at 187, 306 N.E.2d at 159, 351 N.Y.S.2d at 135.

297. *Id.*

298. *Id.* at 188, 306 N.E.2d at 159, 351 N.Y.S.2d at 136 (quoting *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968)).

299. *Id.*

300. *Id.*

301. *Id.* at 188, 306 N.E.2d at 160, 351 N.Y.S.2d at 136.

ees to consider the welfare and economic stability of Mount Kisco as its first concern.³⁰²

D. *When a Court Finds Conformance with "Current Comprehensiveness of Planning" it Places a Heavy Burden of Proof on the Challenger*

A property owner in Huntington challenged a local zoning ordinance that restricted development to single-family homes built on one-acre lots. The subject property in *Tilles Investment Co. v. Town of Huntington*³⁰³ was undeveloped farmland consisting of two contiguous lots totaling approximately fifty-two acres.³⁰⁴ This property was bounded on three sides by residential districts, with commercial and industrial zoning to the east and northeast. The plaintiff contended that the continued residential zoning of his property was invalid because it was "not in accord with a comprehensive plan."³⁰⁵

The court of appeals rejected the argument because the plaintiff did "not demonstrate that the Town ha[d] so deviated

302. *Id.* at 189, 306 N.E.2d at 160, 351 N.Y.S.2d at 136-37. Moreover, "there was nothing in the record [to] suggest . . . the action taken resulted from favoritism for the owners or any other extraneous influence." *Id.* at 189, 306 N.E.2d at 160, 351 N.Y.S.2d at 137.

Judge Breitel's dissent focused on the fact that "more than one municipality's plan was at stake," and that "the usual test of administrative action under the rubric of 'arbitrary and capricious' [may not be] the proper standard." *Id.* at 189, 306 N.E.2d at 160, 351 N.Y.S.2d at 137 (Breitel, J., dissenting). According to the dissent, the scope of review should have been determined in light of procedural requirements for notice, hearing and standing, which considers the interests of conflicting localities and allows the court to override the delegated authority of the municipality to zone. *Id.* at 190, 306 N.E.2d at 161, 351 N.Y.S.2d at 137-38. Judge Breitel stated:

Section 452 of the Westchester County Administrative Code, a primitive form of regional planning, confers on the courts a mandate to perform some sort of equitable adjustment. The section requires that notice and opportunity to be heard be accorded any adjoining municipality when a city, town or village proposes a zoning change for property lying within 500 feet of the boundary of the adjoining municipality. . . . In balancing the equities, flexibility and good judgment must be exercised. . . . [T]here is a strong presumption favoring the municipality's delegated authority to regulate land uses within its own territory.

Id. Therefore, the effect of the zoning on the adjacent municipality could be severe enough to override the authority of Mount Kisco to rezone the property. *Id.* at 191, 306 N.E.2d at 162, 351 N.Y.S.2d at 139.

303. 74 N.Y.2d 885, 547 N.E.2d 90, 547 N.Y.S.2d 835 (1989).

304. *Id.* at 887, 547 N.E.2d at 90-91, 547 N.Y.S.2d at 835-36.

305. *Id.*, 547 N.E.2d at 91, 547 N.Y.S.2d at 836.

from its original plan that a comprehensive plan [was] no longer in existence.”³⁰⁶ The court found that although there had been numerous changes in the master plan affecting the area where the plaintiff’s property was located, the development of surrounding areas reflected the town’s original intention to keep the area residential.³⁰⁷ “While the statutory requirement serves to protect individuals from arbitrary action on the part of local zoning authorities, it mandates ‘comprehensiveness of planning [and not] slavish servitude to any particular comprehensive plan.’”³⁰⁸ Therefore, the ordinance was upheld as “rationally serv[ing] the Town’s continued interest in fostering residential development.”³⁰⁹

V. Comprehensive Planning in the Year 2000

The practical lesson learned from a review of these cases is straightforward: judges will seldom overturn land use regulations when it is obvious, in the structure of the regulatory program, that considerable and comprehensive planning is involved. In each of the decisions discussed in Part IV, the crafting of a regulation to meet a valid local planning objective saved the regulation from falling under a property owner’s attack.

The courts have impressed on local officials that they should take planning seriously as they consider and adopt land use regulations. The cumulative effect of the case law provides a powerful incentive for local governments to adopt land use plans, to keep them current and to see that local land use regulations accomplish their objectives. However, this is a lesson better taught by the state legislature. Until the land use statutes are amended to accommodate this judicial comprehensive planning imperative, New York’s municipalities are at risk of not knowing of its importance and having their land use regulations invalidated.

There is a more crucial lesson that the case law teaches, however, one that must be learned before the land use system is

306. *Id.*

307. *Id.*

308. *Id.* (citing *Udell*, 21 N.Y.2d at 469, 235 N.E.2d at 901, 288 N.Y.S.2d at 893 and quoting *Town of Bedford*, 33 N.Y.2d at 188, 306 N.E.2d at 159, 351 N.Y.S.2d at 136) (citations omitted).

309. *Id.* at 888, 547 N.E.2d at 91, 547 N.Y.S.2d at 836.

capable of handling the challenges of the twenty-first century. It is that "comprehensive" planning, in modern society, means planning that considers and is responsive to "regional" land use needs. When regulations only have local effects, it is enough that they conform with a land use plan that is "comprehensive" in that it considers and accommodates the local impacts of land development. However, as seen in the case of *Town of Bedford v. Village of Mount Kisco*,³¹⁰ the impacts of local zoning and planning often are intermunicipal or regional in nature. The case demonstrates the inability of the Town of Bedford to influence a rezoning in the adjacent village of Mount Kisco.³¹¹ The impact on the town was proximate and immediate. *Long Island Pine Barrens Soc'y, Inc. v. Planning Board*³¹² similarly demonstrates the inability of three adjacent towns to collaborate in measuring the impacts of their actions regarding over 200 development projects affecting the drinking water resource of nearly two and a half million people.³¹³ The *Berenson v. New Castle*³¹⁴ and *Golden v. Planning Board*³¹⁵ cases demonstrate that regions experience patterns of development that are greatly influenced by the land use decisions of constituent municipalities.³¹⁶ The pollution of Long Island Sound and New York City's water system cannot be stopped without some method of coordinating the development decisions of the dozens of local jurisdictions in their watersheds.³¹⁷

Today, local land use decisions regularly have regional impacts. This was not the case when the land use system was created in the early years of the twentieth century, when communities were separated geographically. Eighty years of urban sprawl, hastened by the automobile and expansive highway system,³¹⁸ have brought local jurisdictions and their residents into such close proximity that their actions greatly affect one another. Cit-

310. 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

311. See *supra* notes 290-302 and accompanying text.

312. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

313. See *supra* notes 63-69 and accompanying text.

314. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

315. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

316. See *supra* notes 57-62 and *infra* note 332 and accompanying text.

317. See *supra* note 68.

318. See Richmond, *supra* note 107, at 329-30.

izenship for most local residents is interjurisdictional as well: they live in one locality, work in another and shop and recreate in still others. Although the courts recognize these intermunicipal connections and encourage local zoning to accommodate regional needs,³¹⁹ there is no statutory requirement that local comprehensive plans consider regional interests. The New York legislature has not provided for a state-wide system of regional plans to which local plans could conform if their local drafters wished them to do so.³²⁰

Without some form of comprehensive planning at the regional level, the intermunicipal impacts of local land use decisions cannot be anticipated, measured and mitigated. These impacts have given birth to a dizzying array of federal and state statutes, the cumulative effect of which is to further erode local control over the land.³²¹ Without regional planning, there is little opportunity to coordinate federal, state and local regulations and programs. This defect in the historic land use system frustrates the goals of a large number of interest groups, not the least of which are local officials who desire to control their municipal destinies. Among those directly disadvantaged by the lack of regional planning are transportation and capital facility

319. See *supra* notes 57-62 and text accompanying.

320. See discussion *infra*, notes 340-44 and text accompanying. For examples of two distinct types of regional planning strategies that do exist in New York, see the Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-820 (McKinney 1982 & Supp. 1993) and the Hudson River Valley Greenway Act, N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 44-0121 (McKinney Supp. 1993).

321. A few examples, illustrative of this point follow: the Federal Water Pollution Prevention and Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. III 1991) and the State Pollutant Discharge Elimination System, N.Y. ENVTL. CONSERV. LAW §§ 17-0801 to 17-0829 (McKinney 1984 & Supp. 1993) together regulate the discharge of pollutants into both the surface waters and groundwaters of the state which subjects many development projects to state permitting authority; the National Estuary Program, Clean Water Act, 33 U.S.C. § 1330 (1988), under which authority a moratorium on land development affecting Long Island Sound has been threatened; the Sole Source Aquifer Protection Act, N.Y. ENVTL. CONSERV. LAW, §§ 55-0101 to 55-0117 (McKinney Supp. 1993), under which litigation halted the development of over 200 projects including 12,000 housing units; and the Wild, Scenic and Recreational Rivers System Act, N.Y. ENVTL. CONSERV. LAW §§ 15-2701 to 15-2723 (McKinney 1984 & Supp. 1993), which lists development activities that are allowed and prohibited adjacent to wild, scenic and recreational areas in the state. For a complete discussion of these and numerous other federal and state statutes that affect local control of land use see, John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497 (1993).

planners, business and development interests, those in need of affordable housing, farmers, preservationists and environmentalists. The stake of each of these groups in regional planning merits explanation.

It is recognized that efficient transportation systems cannot be created without "comprehensive regional and local land use planning."³²² In New York, state transportation planners have suggested that this difficulty be remedied by the adoption of a comprehensive regional land use planning system.³²³ For these planners, the principal benefit of regional comprehensive planning is that it affords a workable basis for providing transportation facilities at the same time that development occurs and when the demand for such facilities is created. If such a system of regional planning existed, the Department of Transportation, charged with transportation facility planning, could coordinate its efforts with those of local governments which have plenary land use decision making authority.³²⁴ Among capital facility

322. There will be no solution to transportation and related problems without better comprehensive regional and local land use planning. . . . Comprehensive, multi-modal and multi-disciplined planning can integrate transportation, air quality, energy, economic, social, environmental and land use goals and objectives, maximizing and leveraging limited fiscal resources to meet Federal, State, regional and local needs. Comprehensive planning and growth management can provide a balance between land use development and the provision of adequate infrastructure, while encouraging economic development and preserving and enhancing our man made and natural environment.

NEW YORK STATE DEP'T OF TRANSP., 21ST CENTURY MOBILITY, MOVING PEOPLE AND GOODS, THE TRANSPORTATION PLAN FOR THE HUDSON VALLEY, 262 (1992). This perspective is shared widely. See, e.g., LINKING TRANSPORTATION AND LAND USE PLANNING: A KEY TO SUBURBAN GROWTH MANAGEMENT, RESOURCE MANUAL, 1990/91, referring to reports with similar conclusions prepared in Florida, Maryland, New Jersey, Oregon, and Washington.

323. "In order to better integrate Land Use and Transportation the following recommendations are made for implementation: . . . Support Comprehensive Planning and Growth Management Legislation to introduce a statewide coordinated planning process for State, regional and local governments." NEW YORK STATE DEP'T OF TRANSP., *supra* note 322, at 262 (italics omitted).

324. Under such legislation a State and Regional Planning process would be established consisting of a State Comprehensive Plan, State Agency Functional Plans, Regional and Local Comprehensive Plans. Each plan would be consistent with the State Comprehensive Plan. These coordinated planning products would guide the growth management process and provide the necessary linkage between land use and transportation goals. The growth management process would require localities to project their needs for roads, water, sewer and other facilities and ensure that the facilities are funded and constructed concurrently with the growth

planners of all types there is a deepening understanding that infrastructure development cannot occur without benefit of the type of state-wide system recommended by the New York State Department of Transportation.³²⁵

Advocates of economic growth also call for regional land use planning as a means of avoiding economic stagnation and promoting economic competitiveness. Their reasoning relates closely to that of infrastructure providers who urge that land be developed concurrently with the provision of supportive capital facilities. Private market development is dependent not only on the requirements of local zoning, but also on the availability of supportive infrastructure.³²⁶ Business leaders recognize that fragmentation in land use planning results directly in the fragmentation of economic development.³²⁷ Their recommendations parallel those of the State Department of Transportation in recommending intermunicipal and regional land use planning.³²⁸

The judiciary has called for the adoption of a system of regional planning to protect those in need of affordable housing, the lack of which has been labeled a "crisis" in New York.³²⁹ In

that they serve.

Id.

325. In calling for capital facilities to be provided at the same time that the development to be served by such facilities occurs, the New York State Department of Transportation is recommending a general approach to infrastructure planning recently adopted by the state legislature in Florida. The distinguishing ingredient of the Florida state-wide land use system is its "concurrency" requirement. "It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development." FLA. STAT. ANN. § 163.3177(10)(h) (West 1990). See Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. LAND USE & ENVTL. L. 241 (1990). Concurrency, under the Florida system, requires that local governments not issue development permits unless the impacts of development will not degrade public facilities and services below established levels of quality. JOHN M. DEGROVE, *PLANNING AND GROWTH MANAGEMENT IN THE STATES* 7 (1992).

326. "Most private sector development would not occur without adequate infrastructure." BDO SEIDMAN, *BUSINESS DEVELOPMENT AND ECONOMIC VITALITY, WESTCHESTER AT THE CROSSROADS* 6 (1991) (an interdisciplinary study of economic stagnation in Westchester County, New York).

327. "With such a fragmentation of planning and development controls, it is increasingly difficult to coordinate business development on a regional basis." *Id.* at 24.

328. "We believe Westchester is at a crossroads imposing new leadership demands. We need to retain the businesses we have and attract new ones. We need to have realistic government regulation and zoning and more county-wide planning." *Id.* at 31.

329. "Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that

1975, the Court of Appeals wrote: "[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional [housing] needs be met."³³⁰ New York's courts have recognized that regional land use guidelines are necessary to insure the provision of an adequate supply of affordable housing for the residents and workers within the region.³³¹

Similarly, the New York legislature recognizes that the state's natural environment requires land use regulations that transcend local political boundaries. For example, the legislature passed the Adirondack Park Agency Act which placed responsibility for land use planning and regulation over one-fifth of the state's land area in a regional agency, the Adirondack Park Agency.³³² The legislature similarly effected local zoning authority by prescribing development activities that are allowed or prohibited adjacent to wild, scenic and recreational rivers, which flow through various political jurisdictions.³³³ Under Article 11 of the Public Health Law, adopted by the state legislature, the State Department of Health in conjunction with New York City's Department of Environmental Protection, has the power to regulate land uses over a 2,000 square mile area in order to protect the quality of the city's drinking water system.³³⁴ Under

zoning often has a substantial impact beyond the boundaries of the municipality." *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975). "The people of New York State face a housing crisis." *Governor's Housing Task Force, Housing in New York, Building for the Future* (1988).

330. *Berenson*, 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681 (italics omitted).

331. Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.

Id. at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682.

332. N.Y. EXEC. LAW §§ 800-820 (McKinney 1982 & Supp. 1993).

333. N.Y. ENVTL. CONSERV. LAW §§ 15-2701 to 15-2723 (McKinney 1984 & Supp. 1993).

334. N.Y. PUB. HEALTH LAW §§ 1100-1108 (McKinney 1985); see also Mark A. Chertok and Michael D. Zarin, *Land Use Conflict Between City and Watershed Area Heats*

state legislation, freshwater wetlands of over 12.4 acres in size may not be developed without a state agency permit, regardless of a local jurisdiction's approval of a development proposal.³³⁵ These are but a few examples of a host of recent legislative enactments that preempt, shape or direct local land use authority in the interest of protecting natural resources of regional significance.³³⁶

The state's overarching interest in preserving farmland and the agricultural economy, an issue of critical importance to New York's rural regions, led in 1971 to the enactment of legislation providing for state agency oversight of local land use regulations. Municipalities in certain areas are prohibited from unreasonably restricting or regulating farm structures or farming practices unless they have a direct relationship to public health or safety.³³⁷ More recently, the state legislature found that "agricultural lands are irreplaceable state assets" and that "[e]xternal pressures on farm stability such as population growth in non-metropolitan areas and public infrastructure development pose a significant threat to farm operations. . . ."³³⁸ Under this legislation, regional bodies are given the authority to develop plans for the protection of the state's agricultural lands.³³⁹

Finally, New York's strong tradition of local control of land use has failed to give effective control over the impacts of land development to localities themselves. No rural municipality is capable of adopting land use policies that will save the rural agrarian land base; this it must do together with other municipalities for the problem of agricultural land disappearance to be solved. Similarly, wild and scenic rivers, wetlands, and air and water quality cannot be protected by the land use policies of individual communities. This they must do in concert with the other municipalities in the relevant ecological system. A climate

Up, N.Y. L.J., June 14, 1993, at S-1, S-10 (outlining scope of the watershed area and the power to regulate within it).

335. N.Y. ENVTL. CONSERV. LAW §§ 24-0101 to 24-1305 (McKinney 1984 & Supp. 1993).

336. For a complete discussion of these state statutes, see NOLON, *supra* note 321.

337. N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney 1991).

338. Agricultural and Farmland Protection Programs, N.Y. AGRIC. & MKTS. LAW § 321 (McKinney Supp. 1993).

339. *Id.* § 324 ("County agricultural and farmland protection boards may develop plans . . .").

conducive to economic development and an adequate supply of affordable housing cannot be created by an individual municipality, since these are the products of regional market forces that can only be affected by regional strategies.

Practically, then, local governments have been stripped of their ability to control the critical impacts of land development and to implement important land related policies. Legally, the recent responses of the legislature and courts to regional problems, such as the crisis in affordable housing and serious threats to critical natural resources, have eroded significantly the authority of local governments to control the use of the land.

How can these diverse and often conflicting interests be integrated and accommodated in the land use system? Together, they constitute an interrelated series of interests that must be addressed as a whole. Housing and job development must be balanced. Private development of all kinds must be coordinated with the provision of supportive infrastructure by the public sector. The pace and location of development must be carefully measured to prevent the disappearance of farmland and control its impacts on the environment, so that natural resources such as endangered species, water bodies and public drinking water systems are not threatened.

In the New York land use system, there is no provision for the accommodation of these diverse interests. The ongoing conversation about comprehensive planning, envisioned by the framers of the historic land use system,³⁴⁰ has been silenced. This is so because it must take place today intermunicipally and among the many interest groups that are affected by the outcomes of land use decisions. In several other states, recent land law reforms have restored to local governments the ability to control these critical land use matters and enabled the discussion about land use decisions to continue among those affected by them.³⁴¹ Such initiatives, often called growth management statutes, generally ensure that state and local land use regula-

340. See *supra* notes 52-53 and text accompanying.

341. See Symposium, *Growth Management and the Environment in the 1990s*, 24 *LOY. L.A. L. REV.* 905 (1991). The following states have adopted growth management statutes: Florida, Georgia, Hawaii, Maine, New Jersey, Oregon, Rhode Island, Vermont, and Washington.

tions are tied to regional comprehensive land use plans. These emerging strategies consider, arbitrate, and represent a wide variety of interests including economic and residential development, infrastructure provision, the preservation of open space and agricultural lands, and the protection of the environment, among others.³⁴²

At a gathering at Cornell University, a prestigious group of New York land use planners endorsed the general pattern of reform in these other jurisdictions and recommended its consideration by the legislature and governor.³⁴³ The assembly's consensus statement contained the following observations and recommendations that clearly mark the path for land use reform in New York:

- There must be a concise statement of land use planning goals adopted by the Governor and the legislature.
- Planning must include both vertical and horizontal consistency; all decisions which affect land use, at all levels of government, must be consistent with the state's overall goals and policies.
- The state must assist in the implementation of locally developed and regionally coordinated land use solutions.
- County planning agencies should coordinate state and local planning.
- The state must clearly define cogent regions for the purposes of need identification, planning and coordination.
- The state should provide financial incentives for the development and implementation of plans that are coordinated in

342. Most of the statewide planning statutes require that the following elements be included in local and regional comprehensive plans: transportation, economic development, affordable housing, environmental and natural resource preservation and agriculture. See Patricia Salkin, *The Path Toward Reform? Growth Management Statutes in Other States*, Coursebook for a Conference on New York Land Use Law Reform, Chapter 10, Chart J and Table 1, April, 1993.

343. A position statement on these issues was drafted to reflect the consensus of the participants in the 1990 Spring Conference on the State of Planning in New York sponsored by the New York State Association of County Planners, the Cornell University Department of City and Regional Planning, in collaboration with the Regional Plan Association, the Upstate and Metropolitan New York Chapters of the American Planning Association, the New York Planning Federation, and the Upstate New York Chapter of the American Society of Landscape Architects. The quoted statement was adopted by the participants in Ithaca, New York on June 16, 1990.

this fashion.³⁴⁴

Shortly after this statement was adopted by representatives of New York's principal planning organizations, the state legislature adopted a regional planning strategy for the Hudson River Valley that partly responds to the statement's recommendations. In 1991, the Hudson River Valley Greenway Act was adopted designating ten counties that adjoin the Hudson River, from Westchester to Albany counties, as a planning region.³⁴⁵ Municipalities in the Greenway region are encouraged by the Act to update their local land use plans and to engage with their neighboring communities in voluntary regional land use planning.³⁴⁶ The legislation provides for the formation of a regional agency to assist them, technically and financially, with the preparation of these plans.³⁴⁷

Among the incentives to localities to participate in regional planning under the Act is that state agencies must conform their actions in the region to the provisions of the regional plan. Once a regional plan is adopted under this statute, for example, the State Department of Transportation will be able to ensure that its transportation facility development accomplishes the objectives of the aggregated local plans. In this way, the Department of Transportation is enabled to plan in conjunction with those who possess land use authority, as it has expressed a critical need to do.³⁴⁸ As important, in this one region of the state, the Act makes it possible for municipalities to reclaim effective local control over land use within the context of a regional planning strategy.

VI. Conclusion

The Hudson Valley Greenway Act is an encouraging sign that the New York legislature is awakening to the land use needs of the twenty-first century. Despite this beginning, the legislature has yet to consider adopting a state-wide system of

344. 1990 Spring Conference on the State of Planning in New York, Consensus Position on State Planning (June 19, 1990) (on file with the *Pace Law Review*).

345. N.Y. ENVTL. CONSERV. LAW, § 44-0109 (McKinney Supp. 1993).

346. *Id.* § 44-0119(3).

347. *Id.* § 44-0119(1).

348. *See supra* note 322.

regional planning guided by a clear statement of the state's interest in responsible land use planning. This is so despite the criticism of the state's court and mounting evidence of discontent among economic interests, developers, housing advocates, farmers, environmentalists, and local officials regarding the weaknesses of the land use system.³⁴⁹ This emerging consensus that the land use system must be reformed represents an opportunity for the state legislature to study the progress other states have made and to respond to the problems identified by the courts over twenty years ago.³⁵⁰

The framers of the historical land use system reasoned that land use regulations should be "in accordance with" comprehensive land planning.³⁵¹ In their day, local zoning was the preeminent technique for regulating land use and for shaping regional development patterns.³⁵² Federal, state and regional regulations were not a significant factor in land development at that time. Cities and villages were largely distinct and geographically separate centers of population.

Although the framers of this system were less than clear as to how tightly and explicitly land regulations were to be bound to comprehensive planning, the idea was clear: planning, of a scope and level of detail needed to inform and insure the reasonableness of regulations, was required as a precondition of land use regulation. For this clear vision to be realized today, local comprehensive plans must be adopted, and they must be responsive to regional needs.

How are local plans to accommodate regional needs when the state itself has not defined regions for planning purposes, has not collected and disseminated relevant regional data, nor properly identified truly regional needs? How is the state to move toward regional planning when, at the state level, there is no definition of the state-wide interests in sound regional land use policies?

The trend toward systematic regional planning is responsive

349. See Alistair M. Hanna, *New York Land Use Opinion Survey*, 13 PACE L. REV. 415, 421-25 (1993).

350. See *supra* notes 57-62.

351. See *supra* notes 33-35 and accompanying text.

352. See *supra* note 32 and accompanying text.

to these problems. It must be studied and evaluated. The strategies emerging in other states offer a blueprint for reform, a method of balancing environmental protection and development rights, returning effective control of land use to local governments, harmonizing local and state interests, and coordinating the use of limited public resources with a uniform vision of land development.

The state's highest court has called for "[s]tate-wide or regional control of planning."³⁵³ The stakeholders in New York's land use system are increasingly critical of it.³⁵⁴ Other legislatures have adopted reforms responsive to similar sentiments in their states. It is time for the New York state legislature to respond to the opportunity to enable New York's land use regulators to develop and implement a vision of how and where to grow.

353. *See supra* note 58.

354. *See supra* note 349.